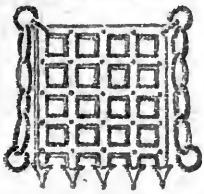
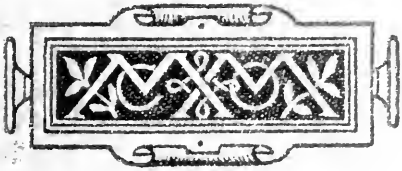
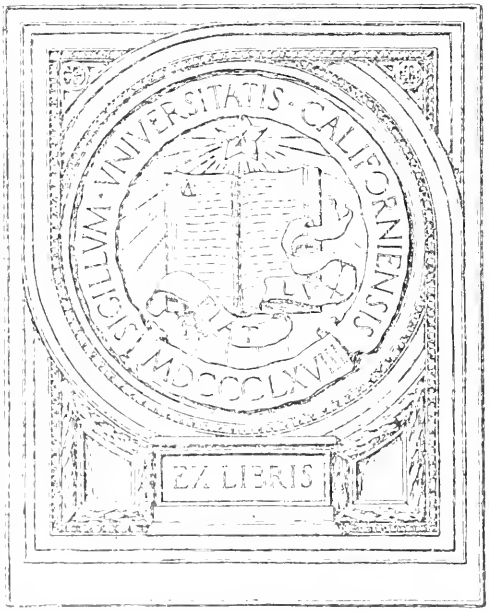
The English Citizen



JUSTICE AND POLICE

F. W. MAITLAND





Justice and Police

THE ENGLISH CITIZEN

HIS RIGHTS AND RESPONSIBILITIES

JUSTICE AND POLICE

BY

F. W. MAITLAND

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PREFACE.

It was at one time hoped that the book in this Series on Justice and Police would be written by Mr. C. P. Ilbert. But he was called away to the Council Board of India, and after a while the work was placed in my hands. My already great regret that the book comes not from him but from me has been increased by reading two chapters of the unfinished work that he left behind him. They were about the County Courts and the relation between Equity and Law, and I have had the great advantage of using them in the revision of what I had already written on the same topics; but for no part of this book can he be held answerable. I am also deep in debt to many writers on English law, but above all to Mr. Justice Stephen and Dr. Rudolph Gneist. This book is so short and slight that I must content myself with a general and inadequate acknowledgment of my

debts. Seeing that to treat my huge subject exhaustively was out of the question, it has been my endeavour to notice those things which, though of common importance, may not be perfectly well known to every reader of newspapers—*non subtilia sed utilia*, as an illustrious writer said when he undertook a simila task six hundred years ago.

F. W. M.

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JUSTICE AND POLICE.

CHAPTER I.

THE DOMAIN OF ENGLISH JUSTICE.

THE word *Justice* on our title-page will not lead any English citizen to expect a book on English law in general. Sometimes by this word we seemingly do mean the whole law. Thus when we speak of courts administering justice we mean that they administer law. But by coupling *Police* with *Justice* we narrow the meaning of the latter word. By the *Justice and Police* of a country are meant those institutions and processes whereby that country's law is enforced; whereby, for example, those who are wronged obtain their legal remedies, and those who commit crimes are brought to their legal punishments. These institutions and processes are themselves fixed and determined by law, but the law which fixes and determines them is only a part, and a subsidiary part, of the whole law. There is a large body of rules defining crimes and the punishments of those who commit them, rights and the remedies of those who are wronged, but there is also a body of

rules defining how and by whom, and when and where, rules of the former kind can be put in force, and rules of the latter kind are our subject-matter. Therefore, were the fiction not too audacious, we might conveniently suppose ourselves to know all the English law which defines rights and remedies, crimes and punishments; the difference, for instance, between manslaughter and murder, between real and personal property, the offences for which a man may be sent into penal servitude, and those for which he may be imprisoned. But there is no need of any such fiction. However technical the law on these matters may be, the English citizen is likely to know enough about it to allow of his understanding such brief account as can here be given of the means whereby that law becomes a coercive power. He knows in all grave yet common cases whether he is doing a crime or no, whether his neighbour is wronging him or no, and this knowledge will serve for everyday life. Were it not so, there would be no law, or, which is much the same thing, law would be a set of rules about as useful as those of heraldry.

The rules then that we are to consider are subsidiary, they exist for the sake of other rules which they presuppose. Still they are of great concern to all. It will little avail us that our law about rights and remedies, crimes and punishments, is as good as may be, if the law of civil and criminal procedure is clumsy and inefficient. On the other hand, a system of Justice and Police cannot but do for a nation much other work besides that which it is set to do directly; it will shape the national character, and some awkwardness and insufficiency for its immediate ends may be forgiven it, if it invites and compels the people at large to an active

interest and personal participation in the work of the law.

But let the scope of our undertaking be limited as narrowly as may be, still it will be too wide unless we start with the resolve of attending only to main outlines and things of daily use, to the neglect both of details and of all that is unused or unusual, however curious or picturesque it may be. For instance, of the Ecclesiastical Courts we must say nothing, or no more than this, that they have a memorable history; that, now and again, cases touching doctrine and ritual come before them which rouse deep feeling and influence the future of the national Church; but that such cases are very rare, and that the regular work done by these tribunals (if regular work they can be said to do) is trivial. And there are, at least on paper, manorial and other courts, and possible proceedings which for the same reason must go unnoticed. The history of England has been so unbroken, its very revolutions so legal, that many ancient institutions preserve a nominal being long after all real life has left them.

A more definite boundary lies in this, that we are to speak of England, not of Great Britain, nor the United Kingdom, still less of that great collection of lands which we call the British Empire. With us, then, *England* will include Wales, but not Scotland, Ireland, the Isle of Man, or the Channel Islands. This is the usage of our Statute Book, in which, ever since 1747, the name *England* has comprehended Wales. For a long time before that—we may say ever since 1535—Wales, for all the greater purposes of Justice and Police, had formed part of England, and though until 1830 it had certain courts of its own, still it was not more divided from

England than were the counties palatine, such as Chester, from the rest of England. Scotland, on the other hand, has both substantive law of its own and also an independent system of judicature, magistracy, and police. Ireland has most of its laws in common with England, but it also has a set of courts, judges, magistrates, constables, all to itself.

At most points there is far more likeness between the English and the Irish, than between the English and the Scotch organisation. There is, for example, a system of law courts in Ireland which is very like the English, while the Scotch is quite different. On the other hand, we sometimes find more similarity between England and Scotland than between England and Ireland. Such is the case if we look at the organisation of what we call "the police force," the body of paid constables. Ireland as a whole has a police force in a sense in which Scotland has and England has, not a police force, but many police forces. What, then, we have to say of England will in the main be true of Ireland also. Scotland, too, and England have learnt, and are learning, so much from each other, and have so long formed part of one United Kingdom, whose laws are made by the self-same Parliament, and interpreted by the self-same court of last resort, that though it would still be rash to argue that what is law on one side of the border is law on the other also, none the less, any one who looks beneath technicalities to the weightier matters of the law will see that the two countries are not very foreign to each other, and become less foreign year by year.

But it is not with similarity or dissimilarity that we have to do so much as with independence, and the three countries in their Justice and Police are

independent of each other. As regards the supreme executive control, England is a little more closely bound to Scotland than to Ireland, since "the Irish Executive is still kept distinct, at least outwardly, from that of the rest of the United Kingdom."[1] The powers over the police forces, for example, which for England and Scotland are exercised by the Home Secretary, are exercised for Ireland by the Lord-Lieutenant. Just at one point, and that the highest, the three judicial systems coincide; the House of Lords is the court of last resort for the three countries; it hears appeals from the English, the Irish, the Scotch courts. In this respect the Channel Islands and the Isle of Man are more remote from us. The appeal from their courts is not to the House of Lords but to the Judicial Committee of the Privy Council, the court of last resort for India and the Colonies. Of this great court we shall hardly have to speak again, for though it may be the most notable court held in England, yet it is not, save for some little matters, an English court, a court for England. It is, for instance, the final court of appeal from those ecclesiastical courts of which we are to say no more, but the work that it does as such is only a very small part of its business. From of old the King in Council had exercised an extraordinary jurisdiction, for the most part of a penal kind, in cases which the ordinary tribunals could not meet. The misuse of this power under the Stuarts gained for this tribunal an ill fame, for it was the Court of Star Chamber, and in 1640 this power was taken away. But just then from the smallest beginnings another judicial function of the Council was becoming considerable. As a court of appeal for all the

[1] *Citizen Series*, Traill, *Central Government*, p. 68.

king's lands beyond the seas, the field of its work has constantly grown as conquest and colonisation have given the king new lands in every corner of the world. In 1833 the judicial business of the Council, which until then had been done in a somewhat casual fashion, was intrusted to a Committee which was to be composed of such privy councillors as should be holding or have held certain high judicial posts, and in 1871 four paid judges were appointed. At present, as will be seen hereafter,[1] a scheme is at work, the result of which will be that the paid judges of this court and those of the House of Lords, the other great court of last resort, will be the same persons.

But when we say that England has a system of Justice and Police separate from those of Ireland and Scotland, it is not meant that these two members of the United Kingdom bear to the English system quite the same relation as that borne by foreign countries, such as France, or even that borne by British territories, such as Canada. The subject is complex because it is governed by many particular rules, but the general nature of these may be indicated. It is true that when the question is whether a criminal prosecution can be maintained or a civil action brought in an English court, the crime having been committed, or the cause of action having arisen in some place out of England, the answer will commonly be the same whether that place be Dublin, or Montreal, or Berlin. In each case it is a place "beyond the jurisdiction" of the English court. The old, and still the main, rule of our criminal law is, that for a crime done on land out of England a man cannot be tried in an English court albeit he

[1] See below, p. 59.

is the Queen's subject. To start with, the criminal law was very thoroughly localised; not merely the boundary of England, but the boundary of each county and of each hundred was of great concern. As to the hundred, that has long ceased to have importance, but it is still the primary rule that a man must be tried by a jury of the county in which the crime was done. Statutes have made very many exceptions to this rule; but still it is the rule. Crime, then, done in no county, the ordinary English courts could not punish; but to them has now been transferred a jurisdiction which the court of the Admiral had over crimes done at sea, and some considerable inroads have been made on the rule that a crime done on land out of England cannot be tried here. There is a special law as to crimes done in India, and if treason, murder, or manslaughter is committed on land out of the United Kingdom by a subject of the Queen, he can be tried for it in England.

And so with civil actions. The important question as regards the place at which an act was done, or at which the subject of dispute is situate, is whether it is in England, not whether it is within the United Kingdom or the Queen's dominions. How the competence or the decision of an English court will be affected by the fact that such a place is beyond the jurisdiction, it would be long to tell. "Our courts are said to be more open to admit actions founded upon foreign transactions than those of any other European country; but there are restrictions in respect of locality which exclude some foreign causes of action . . . . such as trespass to land."[1] An English court will not entertain an action

[1] Mr. Justice Willes, *Law Reports*, 6 *Queen's Bench*, p. 28.

for the recovery of land in Austria or in Lanarkshire; on the other hand, a man who is resident in England can be sued in England for a debt contracted by him in Paris: put Peebles for Paris, the result is the same.

But if we regard, not the competence of an English court to entertain a suit or prosecution, but the executive power of making persons and things which are not in England amenable to English justice, then Scotland and Ireland are more closely connected with England than are the colonies, and much more closely than the lands of foreign states. For the arrest of one who has committed a crime, England is organised as a whole, and the United Kingdom as a whole, and the British Empire as a whole. There are warrants for the apprehension of criminals which will authorise their arrest in any part of England; but the usual warrants issued by justices of the peace cannot at once be executed save within the district (usually a county or town) for which the justice is justice, or in case of fresh pursuit, a somewhat wider space. If the warrant is to be put in force in any place beyond these limits, it must first be "backed," endorsed, by one who is a justice for that place. Now, in this respect the United Kingdom is a whole. The warrant of a Yorkshire justice can be made an available authority for arresting a man in Caithness by the same simple process that would make it available in Kent. But if the criminal has fled to any of the Queen's dominions (let us say to a colony) outside the United Kingdom, the procedure for bringing him to trial in England is by no means so simple. In a case of grave crime he can indeed be arrested and sent to England, but the process is set about with safeguards

against oppression. It involves, first, a presumptive proof of the charge before a colonial magistrate; secondly, an opportunity for applying to a colonial court of law, which has a discretionary power of discharging the fugitive if to send him back to England seems oppressive or too severe a punishment; and, lastly, an order by the colonial governor, who again has a discretion to exercise. In this matter there is reciprocity between the several parts of the Queen's dominions; and in sending a fugitive back from England to a colony, the Home Secretary plays the part which in the reverse process is assigned to the colonial governor. But if the fugitive is in a foreign land, then he will be beyond the reach of English or British justice. The foreign state may surrender him, and may be bound by treaty to surrender him. Great Britain has now many treaties with foreign states for the reciprocal extradition of those accused of certain crimes, and there is a definite procedure in this country for the extradition of those whom we are thus bound to surrender. But to execute its own coercive processes in foreign countries, English or British justice makes no endeavour, and of course there are good reasons why none should be made.

If we look at the means of compelling a person to give evidence concerning matters which are before an English court, we see again this triple organisation. A person may be summoned as a witness from any part of England, and if he does not come he can be punished by the court that summoned him. Then again, English courts can summon a witness from Scotland or Ireland, and if he does not come he can be punished by a Scotch or Irish court. From any of the Queen's dominions

outside the United Kingdom he cannot thus be summoned, but in aid of litigation in an English court a commission may be sent out to the colony to take his evidence there, and if he will not give it a colonial court can punish him. If however he is in the land of a foreign state, then it rests with that state to compel him or not to give evidence for the purpose of English litigation; we, for our part, do provide processes whereby a person in England can be compelled to give evidence to be used before foreign tribunals.

Again, the civil judgments of an English court can be made available in Scotland and Ireland, and those of a Scotch or Irish court in England, by a simple process of registration which involves no further litigation. But the judgment of a foreign, or even of a colonial court, cannot be thus enforced in England. Speaking very generally, we may say that an English court will treat the judgment of a foreign or colonial court as deciding finally between the parties to the litigation any question which it professedly decides; but if the person against whom it has been given has lands or goods in England, these cannot be seized until an English action has been brought and an English judgment has been given against him.

What, however, has here been said about the organisation of the United Kingdom as a whole for Justice and Police, and the looser organisation of the British Empire, does but indicate the effect of statutes for the more part quite modern. This organisation has been slowly created as failures of justice have brought home to Parliament the need of connecting together more closely the several lands over which it bears sovereign sway. Possibly

the connection will become yet closer. There was a time when each county in England might have been said to have an independent system of Justice and Police; but we who are to speculate about neither the future nor the past, shall do well to think of England as a territory which has one system all to itself.

CHAPTER II.

CIVIL AND CRIMINAL JUSTICE.

A NATURAL division of our subject has already suggested itself. The main objects of justice are to afford remedies for the infringement of rights, and to insure the punishment of crime. Now, the notion of punishment seems quite distinct from that of exacting redress. The criminal in the interest of the community is hanged or imprisoned. Any person whom his crime has wronged gains nothing by this punishment. The debtor, at the instance of his creditor, is forced to pay what is due; if he will not pay, his goods or lands will be seized in order that the claim against him may be satisfied. Here the creditor obtains something very definite, while the debtor is not punished, he suffers no harm or loss beyond what is necessary in order that another may have his due. This distinction between remedial justice and penal justice is likely to show itself in the law of every age and every country that we can compare with our own, by giving rise to two different systems; there will be criminal cases and civil cases, a criminal procedure and a civil, perhaps criminal courts and civil courts. This distinction is, in general, well marked in England. It is true that for civil and criminal trials the same judges

have been largely employed, that the prosecution of crimes has been left very much to the public at large, that a trial has been conducted in much the same form and spirit whether it would end in sentence of death or in judgment for damages. But, for all this, a civil action is one thing, a criminal prosecution is quite another. A few contrasts should be noted at once.

Of course, though a wrong is often no crime, and a crime is often no wrong, still there are many acts which are both wrongs and crimes. A man may be guilty of high-treason or many other crimes against public order without giving any one a cause of civil action; and even of crimes which are classed as offences against property, many can be committed without any one being injured; the forger is punished though he has not defrauded any one. On the other hand, the notice-board which tells us that "Trespassers will be prosecuted" is, if strictly construed, a wooden falsehood; a mere trespass on the land of another may be the subject of a civil action, but not of a criminal prosecution. Still, very often the same act is both a crime and a wrong. An assault is a case in point, and so is a theft. The defamatory libel that is a wrong is, at least very generally, a crime also. But, with a few exceptions, the rule holds good in England that no remedy or redress can be had in criminal proceedings. One exception may serve to illustrate the rule: the civil remedy of judicial separation can be obtained by a wife against her husband in criminal proceedings founded on an aggravated assault.[1] But this is modern and still anomalous. Indirectly a prosecution may do

[1] Statute, 1878, chap. 19. In the exercise of their summary penal jurisdiction magistrates can sometimes give a small remedy in the form of "amends" or "compensation."

the person wronged a great service. One who has been libelled may clear his good name as effectually by prosecuting his libeller as by bringing a civil action; but the one proceeding will give him nothing, the other will give him compensation; the one will lead to the criminal's punishment, the other will not.

Then, again, though the crime be a wrong, the person wronged has no exclusive or peculiar title to prosecute the offender. In this country any person can prosecute any person for any crime. But a prosecution is theoretically a proceeding on the part of the Queen, and she has two checks upon the power of the prosecutor. She can pardon crimes, whether before or after trial, and can also stop criminal proceedings; the one power is exercised by the Home Secretary, the other by the Attorney-General; but the Queen cannot forgive a wrong done to one of her subjects, or stop a civil action which he brings. On the other hand, a person wronged by a crime can release the offender from the claim for civil redress, but not from the penal consequences of his act; an agreement not to prosecute would, at least in most cases, be void, and in some cases the making of it would itself be a crime. It has also been supposed that if a wrongful act is a felony the person wronged cannot come by his civil remedy until the offender has been prosecuted; but it has become doubtful how, or even whether, this rule can be enforced, and certain that the offender cannot rely on his unprosecuted crime as defence to a civil action. Lastly, criminal proceedings will not (if we neglect one or two small matters) prevent civil proceedings, nor will a civil action prevent a prosecution; the thief is liable to be both punished and compelled to make redress.

But the suggested division of our subject between

Civil Justice and Criminal Justice would not be exhaustive unless we used the word *criminal* in a wide sense. As we shall hereafter see, there are two main methods of getting a man punished: (1) an indictment, which will lead to a trial by jury; (2) summary proceedings before magistrates, in the which there will be trial without jury. Now, some of the misdoings, the *indictable offences*, which might be punished by the former method and very many of the misdoings which are punished by the latter cannot be called *crimes*, unless that word may import but little blame or none at all. Against a man who being bound by law to repair a bridge has left it unrepaired, proceedings may be taken which in form will be much the same as those to which he would be open if he had perjured himself, for he has committed an indictable misdemeanour. This may be considered an exceptional case, and the graver criminal procedure is not often used, save when there is a charge of what all would call a crime. But with the summary procedure this is not so. Many serious offences may be punished by such means, but also those small breaches of public law of which an honest and law-abiding man may well be guilty. If we call these *crimes*, then Parliament in its every session invents many new crimes. For such offences we have no shorter technical term than *offences punishable upon summary conviction*. It must be noticed however that if we should depart somewhat from common usage in calling these offences crimes, still we should not depart from a usage which has been sanctioned by our courts and statutes. Proceedings before a magistrate which may end in the infliction of a small fine upon one who has not sent his child to school, or who has beaten his carpet in the street, are, according to our

books, criminal proceedings, and certainly they are proceedings which end in punishment, not in redress or relief.

However, it may save misunderstandings if we, for our own purposes, adopt the following convention: a *crime* shall be an indictable offence, one for which a man may be indicted by a grand jury and tried by a petty jury; a *minor offence* shall be one for which the offender cannot be indicted, but can be punished after trial without jury. It will be convenient at once to add that in our books of criminal law it is written that "every crime is either treason, felony, or misdemeanour."[1] The word *treason* may speak for itself. The distinction between felonies and other crimes is very old; it comes to us from a time when almost all felonies were capital crimes, and when it was nearly, or quite, correct to define a felony as a crime for which a man forfeits lands and goods. In course of time the distinction has become capricious, and of no great substantive importance; that is to say, we know little about the punishment that a criminal will get when we know only that his crime is felony or (as the case may be) misdemeanour. On the whole, a felony will be a bad crime, but there are bad crimes which are not felonies; perjury, for instance, is a misdemeanour, and the distinction between the larceny which is, and the obtaining by false pretences which is not, a felony, is often very subtle; both would be called theft by any but lawyers. This distinction still complicates criminal procedure; for there is often one rule for felony, another for misdemeanour; probably this old classification of crimes will disappear before long, but its existence must be remembered.

There are some apparent anomalies which deserve a

[1] Stephen, *Digest of Criminal Law*, art. 15.

moment's notice. In this country the ordinary civil procedure has been often employed for what in substance was a penal purpose. We refer to the *penal action*, or action for a money penalty. The King, as already said, has power to pardon crimes and to stay criminal proceedings. It may be that these powers are nowadays exercised only for the most laudable purposes, but the use of them has been jealously dreaded by Parliaments. Therefore, Acts of Parliament have often enforced public duties, and in particular the duties of public officials, not by denouncing against those who should break them any such punishment as fine or imprisonment, but by giving an action of debt against such persons for the recovery of a fixed sum of money. Sometimes such action has been given to "the party grieved," to any person, that is, who is wronged by the breach of duty. In such cases it may be possible to regard the action as an action for a remedy, though the remedy may be out of all proportion to the wrong. To take one famous example, the Habeas Corpus Act of 1679 is studded with heavy money penalties. In substance these were meant to be punishments extremely sure and effective, which no king or minister could prevent, mitigate, or forgive, and just for this reason the mode appointed for exacting these large penalties was not in form a criminal proceeding; it was an action for debt by the party grieved. The sum that he would thus obtain might well be far more than what would compensate any wrong done to him; but compensation was not the object; the officer who kept men in prison unlawfully was to be punished severely, whether the King liked it or no. This is a famous example; but the same machinery has been used for many less notable purposes.

But often a statute has given an action for a penalty, not merely to the person, if any such there be, who is wronged, but to any one of the people who chooses to avail himself of it; in other words, to a common informer. In form there is just an action for a debt, and the procedure is the ordinary civil procedure; but in truth the object often is to punish one who without invading any private right has been guilty of a breach of public law. Important rules are from time to time sanctioned in this way. To act, for instance, as a member of a local board, or as office holder in a municipal corporation without being lawfully qualified, subjects a man to a penalty of £50, recoverable by an action, which in the one case may be brought by any one, and in the other by any burgess. So the regulation of divers trades and professions has been enforced by penal actions, penal in substance, civil in form, given to persons in general, or to persons grieved, or again to some corporation, the Goldsmiths' Company, the Law Society, the Pharmaceutical Society, or the like. Our Parliaments, careful rather of ends than of means, have been inventive of such expedients for insuring obedience to public law.

It will not have been amiss to glance at this matter if thereby we have reminded ourselves that in our law (the product of many forces acting through many ages) the distinctions will not always be found just where we now should draw them. There are some proceedings in our courts about which it is quite possible to raise the question whether they are civil or criminal. The regular means of trying whether the occupant of a public office has any right to the post, *e.g.*, whether he who is acting as mayor of a town has been duly elected, is a proceeding (in "quo warranto") which once was distinctly

penal and which there was some reason for technically calling criminal, until a statute of last year declared that it was to be deemed civil. But still we shall do well to make the distinction between civil and criminal justice a main outline of our work.[1]

[1] It may well be doubted whether every proceeding in a court of law can conveniently be called either civil or criminal, but we are somewhat deeply committed to this theory by Acts of Parliament.

CHAPTER III.

THE COUNTY COURTS.

UNTIL lately, our system of civil courts was very intricate, and no explanation could be given of it without a long historical preamble. It has now become fairly simple and symmetrical. Its chief features are these. There is one court of first instance for the whole of England, with an unlimited competence, namely, the High Court of Justice. Its judicial work is done partly at sittings held at Westminster in the building known as the Royal Courts of Justice, partly at sittings held periodically at divers towns, assize towns, throughout the country. What we may call the official work, preparatory and subordinate to this judicial work, is done partly at a great office at Westminster, partly at district registries scattered about England. From this court there lies an appeal to the Court of Appeal which sits at Westminster. The High Court and Court of Appeal taken together are styled the Supreme Court of Judicature. From the Court of Appeal there lies an appeal to the House of Lords. These courts are central and "superior." Besides these there are some five hundred County Courts, which are local, "inferior," and of limited competence, and whence an appeal lies to the High

Court. There are a few other local courts which, in no bad sense, may be called eccentric. This is a rude sketch to be made somewhat more precise hereafter. We may look first at the County Courts which, if the least splendid, are none the less of great importance.

Nothing in the history of English law has been more momentous than the very thorough centralisation of its judicial system, and the consequent aggregation in London of the whole body of lawyers. Before 1846 there had been a period, to be measured rather in centuries than in years, during which the only civil courts of at all a general competence were the courts at Westminster. We may say not untruly that in 1800 almost all the judicial work of the kingdom was done by fourteen men. Each of the three courts of common law, King's Bench, Common Pleas, Exchequer, had four judges; in the Chancery there were two judges, the Chancellor and the Master of the Rolls. Wales, it is true, and a few palatinates had courts of their own; there were some other local courts of vast antiquity but trifling real value, and the ecclesiastical courts did a good deal of business that was not of a very spiritual kind; still it is almost true that he who had aught against his neighbour had to seek his remedy in Westminster Hall. Once a year into the four northern counties, twice a year through the rest of England, the common law judges went as Commissioners of Assize to try actions; but these actions were depending in courts at Westminster, and many proceedings in them could only be taken at Westminster; there was the seat of judgment, and thither the tribes went up. If the administration of common law was centralised, the administration of the supplemental law called equity was still more centralised;

it was all centre; the two Chancery judges never sat out of London. In dispensing penal justice a much larger number of men, Justices of the Peace, took an active part, and probably it was this large local magistracy which made the concentration of civil justice as tolerable as it was.

Far back in the middle ages there had been local courts in plenty. We must not here say anything of their decline and fall; only let us note, to prevent confusion, that from time immemorial there had been "county courts," wherein, under the presidency of the sheriff, all freeholders of the shire might sit as judges. But, long ago, these courts had ceased to do much business. A statute of 1278 was construed as fixing forty shillings as the limit of their jurisdiction. They were thus hemmed within a boundary, which, though nominally it was never altered, became always narrower as the value of forty shillings became less. The discovery of Mexico and Peru altered the meaning of several rules of English law, the letter of which remained unchanged; it extended the county franchise and the sphere of capital crimes; it also made our petty tribunals very petty indeed. They dragged on an almost useless existence until 1846, when the contentious jurisdiction was taken away from "the old county courts" and transferred to "the new county courts," which were then created.[1] The new courts are connected with the old by a very thin thread of statutory theory, and a name which is singularly inappropriate. The old courts have still a phantom being, though not as judicial tribunals. The statute book authorises the modern county voter to believe, if he can, that when in strictest secrecy he is dropping his

[1] *The County Courts Act*, 1846.

voting paper into the ballot box, he is attending a county court of the old type held by the sheriff; and such a court the sheriff would still have to hold if any one were to be outlawed, but outlawry has gone out of use.[1] Of the two county courts, the old and the new, we may say that the one, if it exist at all, is not a law court, while the other, though an active law court, has nothing to do with the county.

During the last century and the earlier part of this, the pressing demand for cheap and local justice was staved off by the occasional and sporadic creation of little courts, *courts of conscience*, or *courts of requests*. About a hundred of these were erected as now this town, now that, made its voice heard. In general a body of unpaid commissioners, of local tradesmen or the like, was empowered to adjudicate without jury upon very small debts. Not until 1846 was the serious step taken of creating a new system of courts throughout the land, though already in 1830 Brougham, inspired by Bentham, had proposed the plan which in the main was at last adopted. The limit to the competence of the new courts was fixed in the first instance at £20, but so soon as 1850 it was raised to £50,[2] and from that time to the present hardly a session of parliament has gone by which has not by small instalments added something to their powers.

The whole of England, save the city of London (which later legislation has brought practically, though not nominally, within the system), was parcelled out into 491 districts. This scheme can be, and has been, modified by Orders in Council, and there are now, it is believed, 501 such districts. In England it is not to be expected

[1] See below, p. 139. [2] *The County Courts Act*, 1850.

that the territorial arrangement that serves for any one purpose will serve for any other, but on the whole it is not very improbable that a county court district will be coterminous with a poor law union.[1] Its boundary may well cut the boundary of a county, for it belongs to a scheme of geography which takes little heed of county limits. Each district has generally but one place at which the court is held, but in some districts there are two or more "court towns." Then, again, these districts are grouped into fifty-six circuits, each of which has usually one judge and no more. The number of districts in a circuit varies from one to seventeen; one circuit stretches into seven counties, several into five or six; over this circuit-grouping the Lord Chancellor has a certain control. But it is the district, not the circuit, still less the county, that is our unit when we are considering the competence of a court; for each district has a separate court. "The County Court of Suffolk, holden at Beccles and Bungay," is a tribunal as distinct from "the County Court of Suffolk, holden at Lowestoft," and from "the County Court of Norfolk, holden at Great Yarmouth" (though these three lie in one circuit), as it is from "the County Court of Cornwall, holden at Penzance." The name County Court is indeed misleading, a concession to antiquarianism.

The judge is appointed by the Lord Chancellor from among barristers of seven years standing; he can be removed by the Chancellor for inability or misbehaviour; he is disqualified from sitting in the House of Commons, and from practising as a barrister; his salary is charged

[1] As to the poor-law geography, see *Citizen Series*, T. W. Fowle, *The Poor Law*, pp. 110–11, and M. D. Chalmers, *Local Government*, p. 53.

on the consolidated fund. Each court has its registrar and high-bailiff; the same person usually fills both offices; he is a solicitor appointed by the judge with the Chancellor's approval, dismissible by the Chancellor at discretion; he performs important functions of a ministerial and executive kind, and with the leave of the judge he can give judgment in some undefended cases. A court is held in each court town, usually once in every month, except September; but this arrangement, like many other matters concerning these courts, is subject to the orders of the Chancellor. In Liverpool, for example, which has two judges, a court is held almost every day. The judge belongs to the circuit, but the registrar belongs to the district, and has in the court town an office constantly open, whereat he conducts the secretarial work of the court.

The jurisdiction of a County Court is limited in two ways. First, it is geographically limited; it is a court for a district. By this is not meant that its judgments and orders cannot be enforced against persons and things outside the district; it can summon a witness from any part of England, and fine him £10 if he does not come, and goods which are not in the district can be seized and sold under its judgments. But its competence to entertain a complaint is confined by the district boundary. There are some more special rules connecting jurisdiction with geography (if, *e.g.*, one would recover possession of land, one must go where the land lies), but the most general rule is that one may sue a man in the court of any district in which he dwells or carries on business. The rules about this matter are simple, and have occasioned little trouble. The part of the world which men call London, and which statutes

call the Metropolis, has nine courts besides the City of London Court (which is practically a county court for the city), but for many purposes the districts of these ten courts are treated as a single district.

But the jurisdiction of these courts is limited in another way. As already said, it has been doled out by Parliament piecemeal, and at the present moment the result is elaborate, and not very logical. But, in rough, the outlines may be thus stated. With not many exceptions, a County Court can entertain any civil action that the High Court can entertain, and can give therein any remedy that the High Court can give, if only the sum of money or the value of the property at stake does not exceed a certain sum. The great exception is this, that an action for malicious prosecution, libel, slander, seduction, or breach of promise to marry, cannot, however small be the sum claimed, be begun in the County Court. Also, no jurisdiction has been given to these courts in matrimonial causes; they cannot decree divorce or judicial separation. The pecuniary limits in other cases are various. The most important is this, that in an ordinary action for debt or damage the amount claimed must not exceed £50; claims for debts and damages for a less sum are the staple business of the County Courts, but, oddly enough, there are some contracts which can be enforced though £500 is at stake; this is a relic of the time when there were courts of equity distinct from courts of law. If the action be for the partition of an estate, the distribution of a trust fund, the winding-up of a partnership, £500 is the limit, and there are other limits for actions concerning lands, for testamentary actions and for admiralty actions. Again, save for a considerable district comprising

London, the jurisdiction in bankruptcy matters belongs to the County Courts, and here there is no money limit. But the bankruptcy scheme stands apart from the regular County Court scheme; the jurisdiction has been given to a smaller number of courts, which, therefore, have for this purpose wider territories, and much important judicial work is intrusted to the registrar of the court.[1] Lastly, litigants can agree to give the court jurisdiction in some cases, which but for such agreement would have lain outside its sphere.

The truth is that the power of these courts has been slowly growing, and has not grown with equal rapidity in all directions; but, at present, we shall be right in thinking of them as courts whose main, though by no means only, duty is to adjudicate upon claims for debt or damage to the amount of £50. It must be understood, however, that in general they have no exclusive jurisdiction. In most cases the County Court is but an alternative for the High Court. The plaintiff can go to the latter if he pleases, and it can give him relief. Still, it may be very imprudent to go to the High Court. One who takes thither a case that he might have taken to a County Court may find that one of three things will happen: a judge of the High Court will order the removal of the action into the County Court, or though the plaintiff is successful in his suit he will not recover from the defendant the costs of the action, or he will only be allowed such costs as he would have incurred had he chosen the cheaper procedure. There are several rules on the subject which turn on the nature of the action and the amount at stake, but they leave much to the discretion of the judge. No more need be said than that it is

[1] See below, p. 76.

seldom wise to take to the High Court a claim which could be decided in the county, unless one is prepared to show that difficult matter of law, or some other good cause makes the choice reasonable.

It is worth noticing as a sign of the times that under quite recent statutes there are a few actions and other proceedings which can be begun only in a County Court. This is the case with actions brought by workmen against their masters under the Employers' Liability Act, 1880. So, when a still later Act[1] gave to farmers a new right to compensation for improvements, it gave an appeal to the county court judge from the arbitrators who decide in the first instance, and this no matter how large the sum in dispute. Many proposals have been made for enlarging, and even for removing altogether, the money barriers which now confine these courts. Such proposals cannot here be discussed, but it will have been observed that during the last fifty years the judicial organisation of England has undergone a great change. It would be a mistake to think that £50 is a small sum. Of course, there is no absolute standard for the importance of a sum of money; £5 is as important to one man as £500 to another; but there is a sense in which £50 can truly be said to be a large sum: most of the contentious litigation in England is about smaller sums than this. When it is added that every year more than a million actions are begun in the County Courts, and more than a million and a half of money is obtained under their judgments, it will be seen that they are already doing work on a large scale.

The procedure in them is fairly simple, and it is believed that an intelligent suitor has seldom much diffi-

[1] *Agricultural Holdings Act*, 1883.

culty in conducting his case without professional help. And such he is not likely to have if his claim be quite small. Both solicitors and barristers practise in these courts, but the litigants very often appear in person. The normal trial in a County Court is trial before a judge who decides both fact and law without a jury. In any case with leave of the judge, and if the claim exceed £5 then without such leave, either party can insist on a trial by jury. There will be but five jurors; they must be unanimous in their verdict. As a matter of fact, however, juries are very seldom employed.[1] From the judge's determination on any point of law, but not from his decision on matters of fact, there is an appeal to the High Court if the sum which can be recovered in the action exceeds £20, or if the judge gives leave. With the leave of the High Court, but not without, there is a further appeal to the Court of Appeal, and so to the House of Lords.

Outside this general system stand a few other local courts which differ widely in history, in competence, in usefulness. The county of Lancaster preserves the palatine privilege of having its own Chancery, a court which is valued by the thickly-peopled shire. The court of the Vice-Warden of the Stannaries is chiefly concerned with the mining companies of Cornwall and Devon. The City of London has a Lord Mayor's Court, Manchester a Court for the hundred of Salford, Liverpool its Court of Passage, Bristol its Tolzey Court. These, and two or three others, do some

[1] In 1883, the actions determined with a jury were 949, without 610,009.

considerable business. It is reckoned that there are some twenty-eight of these anomalous local courts, but many have done nothing for some years past; they have been worsted in a struggle for existence with the new County Courts.

CHAPTER IV.

LAW AND EQUITY.

New as are the county courts, the central courts of which we are now to speak are in some sort newer yet, for they came into being only in 1875. The change that was then accomplished was great, and perhaps will seem greater as time goes on. But it was a very technical change, and those quite unacquainted with its nature may be inclined to think it nominal. Before, it may be said, there were Courts of Chancery, Queen's Bench, Common Pleas, Exchequer, Probate, Divorce, Admiralty, and also appeal courts or courts of error, the Court of Appeal in Chancery, the Exchequer Chamber; afterwards there was a High Court of Justice and a Court of Appeal, but the former had its Chancery, its Queen's Bench, its Common Pleas, its Exchequer, its Probate, Divorce, and Admiralty Divisions, and though two of these five divisions, the Common Pleas and Exchequer, have since been abolished, the other three remain. Before, there was common law and there was equity; it is said that the two are "fused" and administered concurrently; but it is familiar to all that lawyers are still talking of law and equity, of legal rights and equitable rights, and so forth. Is not then

the alteration but verbal, or at most a matter of minute detail? It may be possible in this chapter to say something which shall help towards an understanding of the change.

That concentration of civil justice to which we have already referred did England one good service. It secured a common law; law, that is, common to the whole land. This seems the original meaning of the phrase *common law;* it is law for England, not for this county, or that borough, though afterwards new contrasts give it a narrower meaning, and it is opposed both to statute law and to equity, law administered only by that new court, the Chancery How much law there really was common to the whole land during the first hundred years or so after the Conquest, is a question which will never be answered very fully; but of this we may be sure, that even if there were not already full grown many local peculiarities which the King's Court ignored and therefore extirpated, still nothing but a strong central control would have prevented their growth in rank abundance. Instead of the myriad local customs of France and Germany, we at a very early time came by a common law. And this was not brought about by the importation from abroad of ready-made law. It is true that in the thirteenth century the King's Court already had professional judges, ecclesiastics for the most part, and the best learning of the time, no matter its origin, did not remain a thing for doctors and scholars. But it was worked into a web of genuinely English law. The administration of that law was not left to a few judges; the good and lawful men of the shire had an active share in the work. Trial by a sworn inquest of neighbours, the mode of trial which came to

be trial by jury, had results of greater value than that of insuring, if it did insure, truer answers to questions of fact than could have been had by other means. While yet judges in declaring law were, according to our modern use of words, freely making law, this mode of trial kept common law and common opinion in harmony; law was the national schoolmaster, but the judges in their law-making were restrained from theories too fine for every-day wear. And so a common law struck deep root and became very stubborn and tough.

Also it became stunted and hide-bound. The process of making law by judicial decisions sets limits to itself. Precedents were remembered and respected; cases were reported; our series of reports goes back to the days of Edward I. The process of making law became much slower; it was held that no new form of civil action could be invented without the sanction of Parliament. The sacred canon was closed, the age of gloss and comment, and it must be added, of evasion and non-natural interpretation had begun. Parliament had come into being as the one proper organ of legislation, and had hanselled its powers by passing a set of statutes, bold and thorough, for the like of which we must turn from the days of Edward I. to those of William IV. But such legislative activity was not to continue; it was a reaction against accumulated grievances; those grievances remedied, Parliament left the common law much to itself.

Its growth had now been checked. It went on growing, indeed, and has never ceased to grow. Many rules that now pass as "common law" can be traced no further than some judicial decision in the present century. But development could only take place within

the limits set by a theoretically complete system of the possible forms of litigation, theoretically complete, but really inadequate to meet the new wants of new times. The limits were strained by interpretation, and much new matter was brought within them by a copious use of fictions, and yet the law was not adequate. But no one would admit its inadequacy. Besides indolence and shiftlessness, besides the influence exercised by a body of lawyers all trained in one school, we must reckon as a cause of this conservatism a sincere but political attachment to the common law as a sure defence against the royal power. This shows itself early in an increasing dread of anything that is supposed to savour of Roman law. Little enough was known of that law, less as time went on; but of this Englishmen were assured, that it presupposed a ruler above the law while the King of England, though below no man, was below the law. This reverence for the common law gained strength when, the baronage being crippled by civil strife, the King and commons stood face to face; and it finally justified itself when the royal power dashed against the law and fell back broken. This made a durable impression. In Blackstone's book, for example, we may see an inveterate dread of legislation. He seems to think it above the skill of earthly lawgivers seriously to improve away the faults of the common law without depriving "the subject" of a bulwark, or at least a palladium.

In this strong feeling which waxed from age to age may be found the cause of "equity," of the Chancery and its strange career. By the end of the thirteenth century the King's Court, or Council, had given birth to three ordinary tribunals—those three courts of common

law which were living in 1875. To begin with, each had its proper business; the King's Bench, the pleas of the crown, including all breaches of the king's peace; the Common Pleas, the ordinary civil actions; the Exchequer, matters touching the royal revenue. This is but a rough statement; really the spheres of the King's Bench and Common Pleas overlapped, and this facilitated a practice of stealing work from the Common Pleas which was begun by the King's Bench and adopted by the Exchequer, for more business meant more money. In the end it came about that while each court had some work all its own, each could entertain any of the common civil actions. The story is curious but not of any moment, for the law administered by these three courts was the same common law. But by their side there gradually grew up another court to administer other law. It came to supply a want, but an unacknowledged want.

In giving birth to the three law courts, the King's Court (or Council, as we must now call it) had not perished. The work of ordinary judicature had gone from it, but it was the supreme administrative body, and the distinction between administrative, legislative, and judicial functions was not then as plain as it is now, nor indeed were the powers of the Council very sharply distinguished from the powers of that body which was becoming a House of Lords. The function of hearing appeals from the ordinary courts, or rather of correcting their errors, became centred in the House of Lords, but still there was justice to be done by the King and his Privy Council, justice in cases which the common law would not meet. So the Council exercised a penal jurisdiction: specially it punished the misdemeanours of the powerful who by bribery and

intimidation would escape punishment if left to the dealings of less exalted courts. As Parliament gained strength it protested strenuously against this use of power, and at last what had become the criminal jurisdiction of the Star Chamber was abolished.

But again, petitions for extraordinary relief in civil cases were addressed to the King and referred by him to his Chancellor. He was the King's principal secretary, a member of the Council and the specially learned member, and to him it was natural to send the suppliants for extraordinary relief. In course of time complaints were addressed not to the King but directly to his Chancellor. In the fifteenth century petitions of this kind, bills in chancery, were appeals for exceptional favour. Their tone is the humblest; they ask relief for the love of God and that peerless Princess His Mother, or for His sake who died on the rood-tree a Good Friday, and if the Chancellor will give ear his poor petitioner will ever pray for the increase of his good Lordship. The suppliant is poor, old, sick, his adversary is rich and powerful, will bribe and intimidate, or has by accident or trick obtained some advantage of which he cannot be deprived by the ordinary courts. To restrain an unconscionable or inequitable use of legal rights is not (such seems the theory) to override the law, it really is to do what the law means to do, but is prevented from doing by causes not to be foreseen.

The Chancery might have remained an office for the dispensation of discretionary royal grace closely analogous to the grace that the Queen still dispenses when she pardons a criminal; but a strange combination of causes provided it with an ampler field of work and made it an ordinary court of law, though of a law

that was still called equity. Landowners struggling to free themselves from ancient law, coveting, for instance, that power of leaving lands by will which law denied them, found that the Chancery would aid them in this matter by enforcing a kind of obligation of which the older courts would take no heed. The story is long and has been told better than elsewhere in a book of the present series;[1] so here it must be enough that the Chancellor would enforce the obligations known as uses, trusts, or confidences, and that already in the fifteenth century these obligations became very common. Equity and good conscience had thus acquired a special subject-matter which was enlarged as time went on. Business flowed into the new court, and what at first may have been a more or less arbitrary administration of favours, became a true jurisdiction wielded in regular judicial fashion. It is true that, until lately, chancery judges occasionally used large phrases about good conscience and natural equity, which might have seemed to imply that they were prepared to enforce, according to their own lights, the whole duty of man; but gradually it had become settled that the Chancery, like any other English court, could only administer existing rules to be found, failing statute, in judicial decisions. This change was visible to Blackstone as a completed change. He found it necessary to explain away the theory of equity "propagated by our principal antiquaries and lawyers." "The system of our courts of equity is a laboured, connected system, governed by established rules and bound down by precedents, from which they do not depart, although the reason of some of them may perhaps be liable to objection."[2]

[1] *Citizen Series*, F. Pollock, *The Land Laws*, Chap. IV.

[2] *Commentaries*, Vol. III. p. 432.

In short, the respect for judicial decisions manifested itself in a new field; equity became in fact, though not in name, law, supplementary law, and the process of making law by means of judicial decisions is, as already said, a self-limiting process. Indeed, during the last century that part of English law called equity became on many topics singularly detailed and minute.

It is difficult, then, to describe what equity has been for the last hundred years without either attempting to summarise its particular doctrines, or barely saying that it was such part of English law as was administered only by courts of equity. Taking the latter course, we must say "by courts of equity," and not "by the Court of Chancery," for the Exchequer developed an "equity side" which was suppressed in 1841; the chanceries of the palatinates became courts of equity, and the House of Lords, which already was the court of last resort for the common law, succeeded, after a sharp struggle with the Commons, in establishing its power to hear appeals from the Chancery. But we may perhaps mark the character of equity by calling it supplemental law. From the first the theory had been that equity had come not to destroy but to fulfil, and the success of the Chancery, which was jealously watched by Parliament, had depended on at least an outward observance of this theory. Fulfilment might sometimes look rather like destruction, and just twice or thrice there were serious collisions between the courts, but, except now and then for a critical moment, there was no contradiction between equity and common law. The functions of equity were, and we must say, are, first to give for certain infringements of rights known to the common law better remedies than that law gave;

secondly, to enforce certain duties not enforced by common law. From the Chancery, for example, might be had an injunction commanding my neighbour to pull down a wall wrongfully built by him so as to darken my windows, while the common law salve for this wrong would be damages assessed by a jury—the common law panacea. The great example of merely equitable rights is the right one has for whom another holds property in trust, and the fondness of Englishmen for elaborate settlements and wills has made such rights very common.

In all matters of procedure there was a great difference. In this century, but before the change of 1875, several statutes were passed which tended to narrow the gulf, but originally it was wide. In the Common Law Court questions of fact were tried by a jury; questions of law were decided by a court of four judges. The Chancery could not summon a jury; occasionally it would direct that questions of fact should be tried in a Common Law Court, but commonly the Chancellor, sitting alone, decided fact and law. Before the one tribunal witnesses were examined and cross-examined orally; the other decided on the evidence afforded by written affidavits. Only lately has it been possible in a common law action for either party to give evidence; often the main object of a suit in equity was to extract information from the defendant. These and other differences were grave, the minor differences were innumerable. The suit in equity in all formal respects, its pleadings and processes, was so unlike the action at law that few lawyers were masters of both.

To suggest any reason for the prolonged existence of this dual system would not be easy. It was very fruitful of

litigation, of suits in equity brought to prepare the way for actions at law, or brought in order to stop actions already begun, to say nothing of actions and suits in which an ill-advised plaintiff would discover that he had gone to the wrong court. But some explanation may be found in the persistent survival of the notion that the equitable jurisdiction was still in some sense extraordinary. During the troubled seventeenth century political theories are involved. Bacon can tell James that the Chancery is "the court of your absolute power,"[1] and James can use it to humble the stiff-necked lawyers. It is not soon forgotten that Chancery and Star Chamber are twin sisters, and during the Commonwealth there was good hope that the one would be sent to follow the other. Even when the reaction had come, and all projects of law reform had fallen into bad repute, no one but a Chancery lawyer had a hearty word for the Chancery. Blackstone, though he is civil to this as to all existing arrangements, keeps all his hymns and laudatory reflections for courts whose procedure is more in harmony with the genius of our nation. Englishmen seem to have been unwilling to face the truth that there was among them a court engrossing a vast business, deciding the nicest questions, and all this without a jury.

The difficulty of amalgamating the courts did not grow much less by lapse of time, but at last it was surmounted by the Judicature Acts of 1873 and 1875. The High Court is a court both of common law and equity, and administers the two concurrently, according to the procedure defined by a single body of rules. It may occur to the reader that this being so,

[1] Spedding, *Letters and Life of Bacon*, Vol. V., p. 252.

there can no longer be any meaning in the contrast between common-law and equity. But there still is a meaning, and probably these phrases will be current for some time to come. The "fusion" was but a change in procedure. The principle of that change was that the net result which could formerly have been obtained by proceedings in two courts should thenceforth be obtained by a proceeding in one. Rights and remedies were in general to remain as before; the means of obtaining remedies were to be simpler. But when a lawyer hears that a right is merely equitable, he already knows much about the rules applicable to such a right, or at least knows where to look for them. In dealing with such a right, the High Court will act upon rules developed in the Chancery—rules of equity. These names, then—common-law and equity—are compendious phrases which are likely to live yet a while; but already modern statutes have been taking from them their point, and in course of time the contrast may be forgotten. For example, no chapter of the law had been more elaborately glossed by equity than that relating to the property and civil capacity of a married woman. Our law on this topic had become fixed at an early time. The married woman was incapable of contracting; marriage gave to her husband large rights in her land and made him the owner of her goods. Equity, on the other hand, permitted the creation of trusts which would secure for her what practically was property of which she could freely dispose, and a power of making something very like a contract. A new statute has completely altered the law, and is gradually making matters of ancient history some of the boldest doctrines of equity.

In 1875, then, the three common-law courts and the Chancery were amalgamated. Some other courts of less general importance were thrown into the crucible. There was the Court of Admiralty, which had a long and adventurous history of its own; there were the Court of Probate and the Court of Divorce, both created in 1857, to receive, with some additional powers, that jurisdiction over testamentary and matrimonial causes which had until then belonged to the ecclesiastical courts. On the 1st of November, 1875, a date to be remembered, the new Supreme Court of Judicature came into being. On the 4th of December, 1882, a date hardly less memorable, it took possession of the new home that Mr. Street had built for it. Geography still allows us to say that its home is Westminster, though the old Hall, the first abode of English Justice, is void.

CHAPTER V.

THE HIGH COURT AND THE COURT OF APPEAL.

We turn now to that Supreme Court of Judicature which was created in 1875. It consists, says the statute that made it, of two permanent divisions—the High Court of Justice and the Court of Appeal. Really, each of these divisions is a distinct tribunal. There is convenience in having a name which may stand for the two taken together; in being able to say, for instance, that a committee of the judges of the Supreme Court can make rules for the Supreme Court; but still no judicial work is done by the Supreme Court that is not done either by the High Court or by the Court of Appeal.[1]

Of the High Court there are twenty-three judges, of the Court of Appeal nine; of the two taken together twenty-nine. This falls out thus: of the High Court there are three divisions; the Chancery Division has five judges besides its president the Chancellor: the Queen's Bench Division has fifteen judges, of whom one,

[1] As "the Supreme Court" and "the High Court" must often be mentioned hereafter, the difference between them should be noted. These names are not very happy, but Parliament has forced them upon us.

the Lord Chief Justice, is its president: the Probate, Divorce, and Admiralty Division has but two judges, one of whom presides over the other: the Court of Appeal has six ordinary judges, one of whom is the Master of the Rolls, while the other five bear the title Lords Justices; but the Presidents of the three Divisions of the High Court are also members of the Court of Appeal.

Of the Chancellor's position hereafter;[1] the other judges are appointed by the Queen;[2] they are paid by salaries charged on the consolidated fund; they hold office during good behaviour, but the Queen can remove them on an address presented by both Houses of Parliament. A barrister of ten years' standing may be appointed a judge of the High Court; to be an ordinary judge of the Court of Appeal one must have been a barrister for fifteen years, or a judge of the High Court for one year. The judges cannot sit in the House of Commons, but it often falls out that at least one judge is a peer, and can sit and vote in the House of Lords. Of late a fashion of appointing to judgeships none but friends of the Ministry has been disregarded; but at no time on this side of the Revolution has there been much cause for complaining that judges have been political partisans. The presidents of the three divisions have a certain power of arranging the work of their divisions; the Chief Justice and the Master of the Rolls have also a certain honourable pre-eminence and some special powers and duties (the latter, for example, is head of the Public Record Office), but in general the judges are equals.

Now the High Court is a court for the whole of

[1] See below, p. 64. [2] See below, p. 65.

England, and, subject to what has been said about cases which must be taken in the first instance to some inferior tribunal,[1] it is an "omni-competent" court of civil jurisdiction, that is to say, it can entertain actions of every kind and give to every one whatever remedy our law (including our equity) has for his case. Then, again, it is the court to which appeals can be brought from the county and other inferior courts. Then again, as we shall see hereafter, it is the great court for criminal justice. But also it does a great deal of work, the nature of which will perhaps hardly be suggested by the words *civil and criminal jurisdiction*. It exercises what we may call a corrective control over the proceedings of all lower courts and magistrates, ordering them to hear and determine this case which lies within, prohibiting them from meddling with that matter which lies beyond, their jurisdiction. But further, the King's Bench had and the High Court has, a large power of compelling public officers of all kinds, public corporations of all kinds, to perform this or that public duty. The direct control thus exercised over public officers not by an official bureau, but by a court of law, has been a very remarkable feature of English justice. Hitherto we have done almost entirely without any special tribunals to entertain such complaints as a man may have to make against those who are entrusted with public duties or coercive powers. Such complaints came before the old courts, they come before the High Court, as litigious proceedings to be heard and determined in the ordinary way according to the law of the land. Some special tribunals there are for the decision in a more or less judicial, a more or less administrative, fashion of

[1] See above, p. 28.

questions touching certain public duties ; the Railway Commission is the most serious instance, the Charity Commission is another ; but hitherto such tribunals have not played a large part in English history, and the writ of prohibition whereby the King's Bench used to keep the ecclesiastical courts from transcending their proper bounds has of late been often used to teach the Railway Commission that it is but an inferior court. Occasionally, too, the final decision of a question of law is committed by statute to one of the great departments of the central government for instance, to the Local Government Board—but this also is as yet rare.[1]

To each division of the High Court certain business is specially assigned. Often a plaintiff has a choice ; sometimes there is but one division to which he ought to go. Now this distribution of business though it may be the result of, is none the less a very different thing from the old distinction between courts of law and courts of equity. Any division can now deal thoroughly with every action ; it can recognise all rights whether they be "legal" or "equitable ;" it can give whatever relief English law (including "equity") has in store for the litigants. Also it is a mere matter of convenience which rules made by the judges might at any moment alter and the divisions themselves might be abolished without any Act of Parliament by an Order in Council

[1] I refer more particularly to the power the Board has under Acts relating to the relief of the poor of deciding that expenditure was or was not lawful, and the power the same Board has under the Public Health Act of hearing what is called "an appeal." As to the so-called "equitable jurisdiction" of this Board see T. W. Fowle, *The Poor Law*, p. 108, as to the Railway Commission, Sir T. H. Farrer, *The State in its relation to Trade*, p. 117.

made on the recommendation of the judges.[1] If now a plaintiff makes the mistake of going to the wrong division, it is a mistake which will occasion but little trouble: there is a mode whereby an action at any stage of its existence may be transferred from one division to another, and the division to which it comes by mistake can retain it and do justice in it. The separation of testamentary and matrimonial causes from all other litigation is not unnatural, for an action to obtain a divorce or probate of a will is unlike other actions. In a less degree the same is true of maritime causes, so the Probate Division has a well-defined province of its own. It is more difficult without an enumeration of particulars to describe the special work allotted to the Chancery and the Queen's Bench Divisions, for in part the allotment is only explicable by the fact that cases of a certain sort used to go to the Chancery, others to courts of law. But also in part the allotment is determined by the existence in the Chancery Division of a machinery for taking accounts. A great deal of the business in this division is not contentious litigation. That love of making elaborate dispositions of property, which "equity" fostered, turned the Chancery into a large property office taking charge—not gratuitously—of a vast amount of wealth, and administering (after payment of costs) the various complicated trusts to which that wealth was subject. This work is still done by the Chancery Division, and upwards of seventy million pounds is so invested as to be subject to its orders. To it, for example, are assigned actions for the taking of partnership and other accounts, for the sale

[1] The Common Pleas and Exchequer Divisions were abolished by Order in Council of 16 December, 1880.

and distribution of the proceeds of property subject to any charge, for the partition of estates, for the execution of trusts. On the other hand, the Queen's Bench Division has the criminal jurisdiction, the control over the magistracy, revenue cases, cases touching parliamentary elections and electoral rights, the bankruptcy business of the High Court, and to it there generally go most of the simple civil actions in which the plaintiff claims a debt due to him or damages for a trespass, a libel or the like. The chief practical import of this arrangement is that in cases of a kind specially assigned to the Chancery Division there will be no trial by jury without the leave of the judge. The broad rules about pleading and procedure are much the same in the two divisions; an attempt has been made to preserve the best, to abolish the worst, parts of the two old systems; for instance, unless the parties agree the evidence must now be given orally and in open court, though a judge can direct that in a particular case evidence shall be given in writing or before a commissioner. To some extent, it must be allowed, the fusion of law and equity is more perfect on paper than in practice; old habits which centuries have formed are not destroyed in ten years.

It has long been the English ideal that judicial work should be done by a small number of highly-paid judges acting in constant concert with each other, and despite the rapid growth of population and wealth the number of judges in the superior courts has increased but very slowly.[1] Possibly the smallness of the number may

[1] Each common-law court had long had four judges; one judge was added to each court in 1830, another in 1868. The number of Chancery judges was raised from two to seven by the creation in 1813 of a Vice-Chancellor, in 1841 of two more Vice-Chancellors, and in 1851 of two Lords Justices of Appeal.

be misleading. It will easily be understood that the doing of justice involves a great deal of work that is not judicial, and that this ministerial work must be done by a staff of clerks and other officers. But this is not all; a great many questions between litigants are decided in the first instance by one who is not a judge. The old notion of an action at law was that the parties should at their own risk choose their ground and then stake all upon the issue of one pitched battle. Modern litigation, on the other hand, involves the decision of question after question as it arises. Attempts to do complete justice, to set at rest, if possible, in one action all disputes that there are between plaintiff and defendant, to allow as little influence as may be to mere mistakes or accidents of procedure, make necessary a power of determining many preliminary (or, as they are called, "interlocutory") questions, such as whether and on what terms one of the parties may obtain this or that procedural advantage, may insist upon the production of this document or an answer to that question. Such power is exercised in some cases by a judge sitting privately in chambers. The less momentous matters are brought, in the first instance, before a Master of the Supreme Court [1] or before a District Registrar. A great deal of important and really judicial business in the taking of accounts and the like, is done by a staff of Chief Clerks in the chambers of the Chancery Division. Still, this is only the first instance, and, in general, every litigant can have every question (unless it is merely about costs) argued

[1] For the future there are to be twenty Masters; five years' practice as barrister or solicitor qualifies a man for the post: the appointments are made by the Chancellor, Chief Justice, Master of the Rolls; the tenure is "good behaviour."

solemnly and publicly three times—to wit, before High Court, Court of Appeal, House of Lords. For instance, the House of Lords may have to decide whether before the trial of an action, and as a mere preliminary step, the plaintiff can oblige the defendant to answer certain interrogatories.

The district registries of the High Court are new.[1] Some seventy or eighty of the county court districts, those containing the large towns, have such registries, but the system does not cover the whole country. If a defendant dwells or carries on business in one of these favoured districts, the proceedings in the action preliminary to the trial can be conducted in the registry, and the registrar, who is usually the county court registrar also,[2] has the powers that are exercised in London by the masters. By means of these registries and the periodical circuits of the judges, many actions are now brought and determined without any resort to London.

It is a mistake to suppose that the only, or even the chief, object of civil courts is to decide disputes. Their ultimate object is to prevent wrongful acts and defaults, their immediate object to provide remedies. Now, in the vast majority of cases in which a man to his neighbour's harm does what he ought not to do, or leaves undone what he ought to do, there is no dispute or possibility of dispute. Especially is this true of debts. What then is wanted is that the pressure of the law shall be brought to bear upon the debtor as quickly as

[1] There are also district registries of the Probate Division, whereat wills can be proved when there is no dispute. But these have a different history and therefore a different geography.

[2] See above, p. 25.

possible. This we may too readily forget. The actions which make a stir, which interest lawyers and laymen, are the actions which are fought; but it is in the actions which are not fought, still more in the actions that are not brought, that a good system of procedure shows its goodness. To a perception of this truth are due many modern changes. In about a quarter of the actions that are begun, the plaintiff without any trial or judicial proceeding at once obtains a final judgment against the defendant, because the defendant has no defence and does not appear. In many other cases the plaintiff urging a simple claim for payment of a debt, obtains a final judgment in a very rapid fashion. If the plaintiff verifies his claim by oath, then the defendant can be called on to satisfy a judge that there is really some defence, and if he fails, there will be judgment against him. By far the greater part of the civil justice that is done at all is now done quickly and noiselessly and without anything occurring that any newspaper would notice in the dullest season.

But within our limits we can only hint at the vast mass of cases which are totally or practically undefended. The same must be said of the pleadings in an action, the means by which one party gives the other notice of his claim or defence. It becomes always more difficult to describe these things briefly, because every reform, and of late reforms have come rapidly, leaves procedure less formal, and therefore less describable. It must be enough that the defendant is called before the court by a royal *writ of summons*, on the back of which the plaintiff has stated the substance of his demand, that except in some simple cases the defendant can demand fuller information, a *statement of claim*, that the

defendant must deliver a *statement of defence*, that there is sometimes further pleading, that the case raised by these pleadings is the case to be tried, but that a judge even at the trial has a large power of allowing an amendment of the pleadings, and of controlling the whole procedure by apportioning costs. A very complete control over costs is the regulator of the system. Commonly, the unsuccessful has to pay to the successful party the costs that the latter has incurred, or rather such part of them as are allowed as proper, (for this allowance or "taxation" of costs there are special officers, taxing masters, whose determinations may be reviewed by the court), but the cost of any particular proceeding which is deemed needless or vexatious can be thrown on the victor, and he may occasionally have to pay all costs of the action. In the County Courts there is even less pleading. Usually there is but a notice to the defendant of what it is that the plaintiff wants, and only in certain particular instances need the defendant inform the plaintiff of the defence that will be urged at the trial.

A criminal case, as already said, has still a local character; it can only be tried by a jury of the shire in which, according to the indictment, the crime has been done; the jurors must come from the *venue*, vicinage, neighbourhood. Until lately, this was true also of many civil actions, but now, except in very few cases, the question where an action in the High Court shall be tried is treated as a question of mere convenience. The plaintiff can choose whether it shall be tried at the Royal Courts in the Strand or at any one of the assize towns, though his choice, if unreasonable, may be overruled. If it is tried at the Royal Courts it will be tried by a judge of the High Court without a

jury, or with a jury drawn from Middlesex or the city of London. If it is tried at an assize town, it will be tried by some commissioner of assize (who will probably be one of the judges of the Supreme Court) without a jury, or with a jury drawn from the shire in which that town is situate. In either case the tribunal before which it is thus tried is the High Court of Justice, and the presiding judge or commissioner can there and then pronounce the judgment of that court. The counties are visited by commissioners of assize twice a year for the purpose of trying civil actions, but at some northern towns, civil as well as criminal business is taken four times a year. Of commissioners of assize we shall have more to say below.[1] The judges of the Chancery Division do not preside over trials with jury, except when they are sent out as commissioners of assize, so that if (as well may happen) an action in that division is to be tried with a London or Middlesex jury, the trial will be before a judge of the Queen's Bench Division.

There are two main modes whereby a case is tried in the High Court. It is tried with jury, or it is tried without jury. In the causes which are specially assigned to the Chancery Division there is no trial by jury unless by leave of the judge. Such actions may often involve serious questions of fact, and questions which touch the good name of the parties. An action for the cancellation of a deed, for example, will go to the Chancery Division, and will frequently involve a charge of gross fraud. But the person charged with the fraud will have no right to trial by jury. Such cases have, heretofore, been tried without a jury in the Court of Chancery; they are tried without a jury still; it seems impossible

[1] See p. 152.

to give any other reason for the fact. But in an action of any one of the most common and simple types, any questions of fact that there may be will be submitted to a jury if either party has required this. A simple notice given by one party to the other will secure a jury if the action be grounded on slander, libel, false imprisonment, malicious prosecution, seduction, breach of promise of marriage; in other cases the party must obtain an order for trial by jury, but to such an order he has a right. The requirement of this formality, which is new, seems likely to diminish the number of cases tried by jury. Trial by a single judge, who decides both fact and law, is rapidly becoming a very common mode of civil trial. In the county courts a long experiment has proved that in a vast majority of cases litigants do not care to have a jury, at all events, a jury of five; and to all seeming, those who have cases in the High Court will not use their right to a jury if thereby they are put to the slightest trouble. It is believed that in mercantile disputes of a certain class, the right to a special jury[1] is still valued; cases of libel, breach of promise of marriage, and so forth, one of the two parties will almost certainly desire to bring before a jury; but the fact should be recognised, be it liked or not, that the trial by jury of civil cases is itself on its trial, and the verdict is going against it.

The trial by jury of a civil case is so like the trial of a criminal case, that the two shall be treated together hereafter. Whether there be a jury or no, it is only in rare cases that a trial takes place before more than one judge. When he tries the case without jury he is judge of fact and law, and his judgment is the judgment of

[1] As to special juries, see below, p. 165.

the High Court, from which there lies an appeal to the Court of Appeal. That court sits only at the Royal Courts; ordinarily three of its judges are sitting together in one room, and three others in another; some matters can be heard by two judges, but generally there must be three. By the appeal all questions of fact and law may be reopened, and though usually the evidence given in the High Court is the basis of the decision, still the Appeal Court can and will for special cause admit new evidence. In no case is a jury employed, either in the House of Lords or in the Court of Appeal.

When there is trial by jury, the judge leaves to the jury such questions of fact as arise, and, assuming that the verdict is correct, gives the judgment of the High Court. If, making the same assumption, the defeated litigant thinks the judgment wrong, he can go to the Court of Appeal, and thence to the House of Lords. If, however, he is dissatisfied with the verdict, he applies for a new trial, urging that the judge misdirected the jury, that the verdict was against the weight of evidence, or the like. This application he makes to what is called a "divisional court" of the High Court, which can order or refuse a new trial, and from this decision he or his opponent may appeal to the Court of Appeal, and so the question whether there is to be a new trial may be brought even before the House of Lords.

Certain business of the High Court must be done by a "divisional court," that is to say, by two or more of its judges sitting together without a jury. It is in the form of a tribunal thus constituted that the High Court, besides hearing applications for new trials, hears appeals from inferior courts, exercises its supervisory control

over the magistracy, and in general does such part of its work as does not consist in trying civil actions.[1] In some of these cases there can be no appeal from its decision, in some others none without its leave. But what matters shall be brought before a divisional court and what before a judge sitting alone is one of the many things that can be determined by rules made by the committee of judges to which Parliament has intrusted the duty of supplementing the statute-book.[2]

[1] Since the abolition of the Common Pleas and Exchequer Divisions, the word *divisional* in the phrase "divisional court" has lost most of its point. Practically it means a court constituted by two or more judges of the Queen's Bench Division.

[2] See below, p. 66.

CHAPTER VI.

THE HOUSE OF LORDS AND THE CHANCELLOR.

From almost every order or judgment of the Court of Appeal an appeal may be made to the House of Lords, which, it is needless to say, is one member of our supreme legislative body. But besides this it is a court of law. Such is the theory, and such, subject to some explanation, is the fact. Every person who has a right to sit, debate, and vote, when the House is about its legislative business is also entitled to sit, debate, and vote, when the question is whether the judgment of some lower law court shall be affirmed or reversed. But concerning the constitution of this House we will not speak, for the main facts are well known, and practically our court of last resort is a very different thing from that assembly of lords, spiritual and temporal, which takes part in legislation.

In the last century it became customary for the Lords to leave their judicial business to be done by such only of their number as were distinguished lawyers. Occasionally the other lords, "lay lords," as contrasted with "law lords," interfered, but their interference became uncommon. So late as 1844 certain lay lords were with difficulty dissuaded from meddling with some grave

questions of law which arose out of the famous trial of Daniel O'Connell. But they were dissuaded, and we may now regard it as a rule not likely to be broken, though a rule not in any way enforced by law, that those lords only who are learned in the law are the judges of this court of appeal.[1]

As a matter of fact the only lords who now act as judges are the Lords of Appeal. These are, first, the Lord Chancellor; secondly, the paid Lords of Appeal in Ordinary, of whom there are now three; and thirdly, such other members of the House as are, or have been, judges of the superior courts of England, Ireland, or Scotland. In the ordinary course of affairs there will be at least one lord alive who has formerly been Chancellor; the Lord Chief Justice has very commonly been a peer, and peerages are sometimes given to other judges, or retired judges. Not long ago as many as eight lords were collected to hear a case of some difficulty, but this was an unusually large number. No case can be heard unless three Lords of Appeal are present, and the number present is generally but three or four. The most regular attendants are the Chancellor and the Lords of Appeal in Ordinary. These last have but a very short history. In 1876, after many schemes for "ending or mending" this court of appeal had come to naught, its constitution was strengthened. Power was given the Queen to appoint Lords of Appeal in Ordinary.

[1] On 9th April, 1883, the case of *Clarke* v. *Bradlaugh* being before the House, three "law lords" were for reversing the judgment, one for affirming it; Lord Denman, who must be accounted a layman, expressed his agreement with this one law lord (*Times*, 10th April, 1883); but this incident does not appear in the Journals of the House, and the judgment was reversed without any formal division.

At first there were to be two, and two were at once appointed; ultimately there were to be four; at present there are three. In order to explain this scheme we must refer to the other great court of last resort, the Judicial Committee. There were four paid members of that court. In 1876 it was provided that when two of them should have died or resigned, a third Lord in Ordinary might be appointed, and that when the remaining two should have died or resigned the number of these Lords might be raised to four. The first of these events has happened, and when the second happens the Queen will have power to appoint the fourth Lord. It is the duty of these Lords, if they are Privy Councillors, to sit on the Judicial Committee as well as in the House of Lords, so that in course of time the two ultimate tribunals of the British Empire will have as their paid judges the same five persons, the Chancellor and four Lords in Ordinary.

To be appointed a Lord in Ordinary, a man must have held one of certain high judicial offices, or practised for fifteen years as a barrister in England or Ireland, or as an advocate in Scotland. It should be remembered that this is a court for Ireland and Scotland, as well as for England. Of the three lords at present in being, one had made his fame as an English judge, another as an Irish judge, another as Lord Advocate, the chief law officer of Scotland. They hold their offices during good behaviour, but can be removed by the Queen on an address presented by both houses of Parliament. While they hold office they are for all purposes members of the House of Lords, and can debate and vote as well when the house is acting as a legislative assembly as when it is acting as a court of law. Their position is

not unlike that of the bishops; the dignity of a Lord of Appeal in Ordinary does not descend to his heirs.

By this means the theoretical identity of the court of last resort with the Upper House of Parliament was preserved, and at the same moment some of its worst consequences were destroyed. Until 1876 the court of law called the House of Lords only sat during the session of Parliament, but now it sits when Parliament is prorogued, and it might sit even when Parliament was dissolved. For the results of the identity we must look rather to some matters of form which make a sharp contrast between the House of Lords and the Judicial Committee. In the former, when the litigants or their counsel have been heard, the proceedings are very much those of a deliberative assembly. Each lord makes his speech, gives his advice to the House for or against the reversal of the judgment that is under discussion; there is a debate and a division, and if the votes be equally divided, the judgment is affirmed. On the other hand, when a case is before the Judicial Committee, only one opinion, that of the majority, is delivered. It takes the form of reasons why the Committee will advise the Queen to affirm or reverse the decision in question, and this advice being adopted, effect is given to it by an Order in Council. Whether this advice represents the opinion of all, or only of some of the judges is not publicly announced. For each of these modes of procedure something might be said, but the open voting of the House of Lords seems to be better liked than the artificial unanimity of the Privy Council.

The importance in this country of a last court of appeal is very great, and but a small part of that importance is to be found in the fact that its judgment

is a final decision of a particular dispute. Law is modified by judicial decisions. For centuries past English judges in deciding a case not covered by statute have held themselves bound by the rules in accordance with which cases have been previously decided. It is just this reverence for past decisions that at once enables and compels them, from time to time, to make new law: "judge-made law," as some call it, is the natural outcome of an effort to leave as little as possible to judicial discretion. New habits, new wants, beget new questions which, in one way or another, law courts must decide, questions which could not have been foreseen by the judges of an earlier time. To bring the new cases under the old rules is to alter the old rules. In any particular instance the change may be minute and subtle, and there may be room for doubt whether or no the old rule has been slightly modified; but as decision follows decision, it at last becomes obvious that a substantial addition has been made to the law. In this country the practice of looking for law in judicial decisions has produced a fairly definite standard whereby is measured the authoritative force of the rule upon which a court has grounded its judgment. To mention only what is directly connected with our present topic, the rule whereby the House of Lords decides a case is law for all English courts; the House of Lords itself has disclaimed any power of disregarding what it has once deliberately adopted as law. No lower court can by its decisions make a rule that shall be binding on a higher court; nevertheless, the higher pay respect to the judgments of the lower and seldom overrule them, save when there is some discord between several decisions. But discord there sometimes is; an unforeseen and critical case brings

to light a latent contradiction, and then a court of appeal is compelled to say that a rule which has passed as law is not law. It would be no easy task to give to one who had never studied the subject a just notion of the power that the House of Lords has of authoritatively declaring that to be law which theretofore was but questionably law, or of the mode in which that power is exercised; but enough has been said to suggest that the constitution of the highest court of law is in England a matter of the utmost moment. Possibly our laws allow to a litigant rather too many opportunities of haling his adversary from court to court, but so long as English law keeps its present form, there is great need of a court of last resort which is not over-burdened with business, and can speak with all the more decisive authority because it speaks seldom and at leisure. No more than about forty or fifty English cases come yearly before the House of Lords; Scotland will provide fifteen or thereabouts, and Ireland five or six.

Before the recent reformation the House of Lords frequently exercised the right of requiring the presence of the judges at the hearing of an appeal, and of asking their opinions on questions of law, opinions which the lords were free to adopt or reject. To take this course has now become uncommon, because the House is well supplied with law lords, but a modern case in which the judges were summoned may serve as an example of English litigation in its most sumptuous form.

An action came on for trial at the Newcastle Summer Assizes, 1876; it involved a difficult question of law. In April, 1877, this question was argued in the High Court before three judges of the Queen's Bench Division. In December, 1877, that court's judgment was given for

the defendants, but the judges were divided, two against one. In May, 1878, it came before the Court of Appeal, which in December, 1878, decided that the defendant was not entitled to judgment; but again the judges were divided, two against one. In November, 1879, it was argued before the House of Lords, which desired that there might be further argument in the presence of the judges, and such argument there was in November, 1880, seven judges being in attendance. In March, 1881, these seven delivered their answers to five questions which had been put to them, answers which were not unanimous. In June, 1881, the five lords who had heard the appeal agreed in dismissing it, and the plaintiff was ultimately successful. The various judicial opinions given on this case would fill a much larger book than the present.

The House of Lords has potentially other judicial functions besides those of an appellate tribunal. For treason or for felony a member of that House can only be tried by his peers, but, as during the last hundred years there has been but one such trial, we may well pass this matter by as very trivial; for a misdemeanour a peer is tried just as though he were a commoner. Again, the House of Lords might have to hear the impeachment either of a lord or of a commoner. An impeachment is a criminal proceeding in which the Commons are the accusers and all the Lords are the judges, both of fact and of law. In the past it has been a powerful engine whereby Parliament has controlled the ministers of the Crown, but there is little likelihood of its being used in the immediate future. If a man has committed what really is a crime, he can be prosecuted in the everyday fashion, while if he has been guilty

of some misdoing that is no crime, it is better to let it go unpunished than to invent new law for the occasion. To this it may be added that a modern House of Commons will hardly be brought to a practical admission that in order to control the Queen's ministers it needs the aid of the House of Lords. The last impeachment was that of Lord Melville in 1806.[1]

We have had occasion many times to mention the Lord Chancellor. He is, as it were, a link between the judicial and the executive systems. Certainly his position is as singular as it is splendid. In the first place, he is according to settled usage a member of the Cabinet. This of course is no rule of law, for, as is well known to all, the Cabinet is an entity not known to the law. Whatever legal powers its members may have as privy councillors and as holders of certain high offices, the Cabinet as a body has no legal powers whatever. Still, the Cabinet is a great fact, and to be a member of it is to be a member of what is really a supreme executive council which has vast practical power, not only in administration, but in legislation also. Of this body the Chancellor is a member. Then, again, even were he no peer he would sit as Speaker of the House of Lords, though without any right to debate or vote. But in practice (except perhaps for a day or two after his appointment to the chancellorship) he always is a peer, and though Speaker of the House, can debate and vote like another peer; indeed, he is one of the chief expounders and defenders in the House of Lords of the ministerial policy. He is the foremost of those Lords of Appeal who do the judicial work ascribed to the House of Lords. He is the president of the Court

[1] See Citizen Series, Traill, *Central Government*, p. 28.

of Appeal, of the High Court of Justice, of the Chancery Division of the High Court. He is always a Privy Councillor and a member of the Judicial Committee. He does not in practice sit in the High Court, but he habitually presides in the House of Lords, he not unfrequently sits as a member of the Judicial Committee he occasionally sits in the Court of Appeal.

As a matter of fact, the chancellorship is always given to a very distinguished lawyer, sometimes to one who has been a judge, sometimes to one who has not; but there is no law which confines the choice that can be made by the Queen or her Prime Minister, and there would be plenty of ancient precedents for the choice of a bishop. Also, it will be understood that though the Chancellor is a judge, he differs from all the other judges in that they hold office during good behaviour, that is, in effect, until death or resignation, while the Chancellor holds office nominally during the Queen's good pleasure, practically according to the well understood rules that make the disapprobation of the House of Commons fatal to the career of ministers and ministries.[1]

The Lord Chancellor has much to do with the appointment of judges of many different grades. The judges of the superior courts are appointed by the Queen, but it is believed that according to usage the Queen acts on the recommendation of the Chancellor when a new judge is to be appointed, unless the vacant place be that of the Chancellor or the Lord Chief Justice, and then on the recommendation of the Prime Minister. The Chancellor himself, and without reference to the Queen, appoints the county court judges, and can remove them and the coroners also for inability and misbehaviour.

[1] See Citizen Series, Traill, *Central Government*, chap. ii.

The Queen can appoint and remove the justices of the peace, but, in fact, the appointments are made by the Chancellor, and it is believed that the Queen's pleasure is not usually taken. Over such officers as the county court registrars, some of whom exercise an important bankruptcy jurisdiction, the Chancellor has great power.

But he has yet other powers of the first importance. By the statutes which have remodelled the system of civil judicature, Parliament has placed in divers hands a very large power of supplementing those statutes by general rules of procedure, of from time to time repealing old rules, and making new, and a rule of this kind may be a very momentous law quite capable of determining whether the remedy to be had by a law-suit is worth the having. The procedure, for instance, of the Supreme Court within wide limits set by statute is regulated by a large body of detailed rules, a "code of civil procedure" we well might call it, made by legislative power thus delegated. For the County Courts there is another long code; bankruptcy procedure is regulated by yet a third. The power has been placed in divers hands, but a very large share in the hands of the Chancellor. For the Supreme Court, rules can be made by five judges (of whom the Chancellor must be one) out of a committee of eight, four of whom are selected by the Chancellor. For the County Courts, rules can be made by a committee of five of their judges selected by the Chancellor, and the rules require his approval. The last remodelling of the bankruptcy laws gave a liberal licence of rule-making to the Chancellor and the Board of Trade, that is to say, to two members of the ministry. These delegations of legislative power are new and very remarkable. Also the Chancellor has, under recent statutes, a power of

determining by general rules the price at which justice shall be sold, or, in other words, the fees that shall be taken in the civil courts, but this being a financial matter the concurrence of the Treasury is required. The fees to be taken in the County Courts can be settled by the Treasury with the consent of the Chancellor; those to be taken in bankruptcy proceedings by the Chancellor with the sanction of the Treasury.

This mode of levying revenue deserves a passing notice. The plaintiff in a County Court, to take one instance, must at the outset of his action pay one shilling in the pound on the amount that he claims, and again before the action is heard he must pay another two shillings in the pound. The method of raising money in the High Court is rather different. These fees form part of the costs of the action, which, as a general rule, the successful can recover from the unsuccessful litigant. Normally, therefore, the tax falls in the end upon the party who has been in the wrong. But obviously this is not always the case unless to sue one who succeeds in evading justice, or one who has not wherewith to satisfy your claim, is necessarily to be in the wrong. It might seem then that a more direct means of attaining the desired end would be to tax, in the first instance, the person whom the judgment proves to have been in the wrong, and to supply any deficiency in the revenue by imposing moderate fines upon all those that have suffered injustice.

The Chancellor, then, is a judge of all the great law courts, who habitually presides in the greatest, and he is also the cabinet minister who exercises such controlling power as the central Government has over the administration of civil justice, and as regards those County Courts,

which are becoming of great importance, this power is not small. The functions of the Home Secretary have been described by Mr. Traill;[1] some of them will be noticed hereafter. Were there any need, which there is not, to borrow foreign terms, we might say that the Chancellor is the Minister of Civil Justice, the Home Secretary the Minister of Criminal Justice and Police; but each of these names would have to be used in a narrow sense, and the line is not drawn exactly where a theorist would draw it. The House of Commons is the place for the Home Secretary; the House of Lords for the Chancellor. The Home Secretary is the head of a large and powerful permanent department; the Chancellor is not. The Chancellor is always a learned lawyer, while it is merely our good fortune if the Home Secretary has illuminated the science of international law or the practice of quarter sessions.

[1] *Central Government*, p. 55.

CHAPTER VII.

CIVIL EXECUTION AND BANKRUPTCY.

In the last resort the judgments of a civil court must be executed by force. Goods and lands must be seized and sold, and in some instances persons must be imprisoned. Before noticing the manner in which execution is done, we must glance at the persons who do it. The county courts have for this work officers of their own, high bailiffs,[1] but the judgments of the High Court are still executed by the sheriffs. A plaintiff, for example, who has judgment for a debt, can obtain a writ whereby the Queen bids the sheriff of a county levy the sum out of the goods of the debtor within that county.

Now the whole history of English Justice and Police might be brought under this rubric, *The Decline and Fall of the Sheriff*. The sheriff of the Norman reigns is little less than a viceroy, very strictly answerable to the king, but with great power over all the men of the shire. The shire is let to him at a rent, and he makes what he can out of its administration. But for some seven centuries he has been losing first this function, then that, and we know him now as a country gentleman who, it may be, much against his will, has been

[1] See above, p. 25.

endowed for a single year with high rank and burdened with a curious collection of disconnected duties, the scattered fragments of powers that once were vast. He receives the Queen's judges on their circuits, he acts as returning officer in parliamentary elections, he summons jurors, he executes civil judgments, he has a care that the condemned murderer is hanged. These, and a few others, are duties that have to be done, if not by him then by subordinates, and besides, there are many things which according to law books he might do, but which he never does. He might call out the power of the county (*posse comitatus*) to apprehend a criminal with hue and cry, but justices of the peace and police constables have long rendered needless this rusty machinery. Still he is the greatest man in the county, and may look down upon the lord-lieutenant himself as upon a creature of yesterday.

His appointment is not accomplished without elaborate ceremonies of which little must here be said. Lists are kept for each shire of persons fit and liable to serve. There is no property qualification more distinct than this, that the sheriff ought to have land in the county sufficient to answer to the king and his people; but, in fact, he will be some considerable landowner. The lists are supplied with new names by the sheriffs who suggest them to the judges on circuit. Then on the morrow of St. Martin (12th November) at a meeting at which some of the ministers and of the judges are present, three names are taken from each list, usually the first three, but any one there named has an opportunity of urging an excuse, such as want of means. The three names are submitted to the Queen and she, in practice, chooses the first and marks her choice by pricking a hole opposite

that name in the list that is laid before her. Certain towns have acquired the privilege of being counties of themselves (sometimes they are called *counties corporate* as contrasted with *counties at large*) and of electing their own sheriffs.[1] The election is now made annually by the town council. In general this privilege was acquired, at earliest, in the fifteenth century, but London has enjoyed it from a much older time, and the two sheriffs of London are the one sheriff of Middlesex.

Almost all the duties of the sheriff are performed for him by an undersheriff. The sheriff is bound by law to appoint some fit and proper person to be undersheriff. Commonly he appoints some solicitor of high standing, and though there is nothing to prevent each new sheriff from naming a new undersheriff, still the same person is often undersheriff for many years, and in some instances the office has become well nigh hereditary.[2] In theory, a sheriff, in practice an undersheriff, has much business to do which requires experience of legal routine. In particular, civil execution, though less hazardous than it was but a few years ago, is still risky work. If a sheriff does not obey a writ he is liable to be punished in a summary fashion, for the High Court keeps a tight hold over him. Again, he is civilly liable if he does not seize what he ought to seize, or seizes what he ought not to seize, as, *e.g.*, the goods of a wrong person, and there are many

[1] Bristol, Canterbury, Chester, Exeter, Gloucester, Lincoln, Lichfield, Norwich, Worcester, York, Caermarthen, Haverfordwest, Hull, Newcastle, Nottingham, Poole, Southampton. In 1841 Coventry was merged in the county of Warwick. Oxford also has a sheriff, but is not a county.

[2] There is, I believe, at least one instance in which it has been "in a family" for more than a century.

rules to be observed as to when doors must and when they must not be broken, and so forth, about which, in general, the sheriff himself will know very little. For the conduct of all this business the sheriff himself is primarily responsible; in fact, however, the under-sheriff contracts to indemnify him, and in return receives the fees and percentages which are payable for the doing of civil execution and the like. The work of actually seizing goods and arresting persons is done by bailiffs, who have bound themselves with sureties to the sheriff for the faithful discharge of their duties; policemen are not employed for civil execution. Practically then, the shrievalty is, nowadays, an institution whereby a country gentleman is compelled to guarantee for one year the proper performance of important work in which he takes no active part. It is to the credit of English public spirit that such an institution is still possible.

Now a marked line has of late been drawn between those orders of a civil court which direct a man to pay money, and those which direct him to do, or abstain from doing, some other thing. The latter can be enforced by imprisonment. If a man disobeys an injunction which forbids his building a wall, he can be sent to gaol. The courts have large discretionary powers of keeping such persons in prison until they submit to do what they are bid. On the other hand, a judgment for money must in general be enforced by other means. The plaintiff obtains a writ whereby the sheriff is ordered to levy the sum due. At an early date our law touching the exaction of debts became very severe. This was the result, for the more part, of deliberate legislation. The creditor had the power of

keeping his debtor in gaol until the debt was paid; if the debtor could not pay, he might be imprisoned for the rest of his days. But it is a mistake to suppose that the debtor was punished as an offender. A time when the non-payment of a just debt is deemed a crime may lie before us: it does not lie behind us. The imprisonment of a debtor, "the taking his body in execution," was a means whereby the creditor might extort payment and satisfy resentment; but this was his private right. There is no need to tell how grave a scandal our debtors' prisons became. After the law had already been much mitigated, imprisonment for debt was abolished in 1869.

No man can now be sent to gaol merely because he has not paid money which in a civil action he has been ordered to pay, save in certain cases specified by statute in which he can be imprisoned for a year at the most. But these are cases in which the ground of the order is no mere civil debt, though it may be a merely civil claim. A trustee, for instance, who disobeys an order bidding him pay trust money may thus be imprisoned. But in such a case a judge can use his discretion, and the imprisonment is to be regarded, in part at least, as punishment inflicted on one who has acted dishonestly. Again; if, after an order directing him to pay money, a person has the means of paying but does not pay, then he can be committed to prison for six weeks or less, but will be discharged upon making payment. It has been urged by those most competent to speak that the power to inflict a short term of imprisonment is the most effectual and most humane means of compelling the payment of small debts. Until last year the law had a look of injustice, for a man who owed less than £50

could not become bankrupt and thereby shuffle off his debts. A process has now been introduced whereby those whose debts do not reach that sum may be freed therefrom. A liberal power has been given to the county court judge of deciding on what terms such freedom shall be granted. He can, for instance, order the debtor to pay a certain fraction of all his debts on pain of going to prison. The regular bankruptcy procedure is too elaborate to meet such cases; it remains to be seen whether they can be met by an analogous but summary method.[1]

When a man cannot pay all his debts it is nowadays thought better that his property should be divided rateably among his creditors, than that the rule should be "first come, first served." Also it has been considered sound policy that, his property being taken from him, he should, under certain conditions, be allowed a new start. Neither of these principles is to be found in our early law. We passed through the middle ages without any bankruptcy law at all, and the statutes of Tudors and Stuarts recognise only the first principle, not the second. It is the eighteenth century, "poor bankrupt century," before a debtor can be freed from a debt without the consent of him to whom it is due.[2] At first this was the privilege of traders only, but by slow degrees it was extended to others. It is well to remember this, otherwise we might take too gloomy a view of our prospects. The experience of the last sixty years

[1] See Citizen Series, Farrer, *The State in its Relation to Trade*, p. 35. I make what is here said of bankruptcy the shorter because Sir T. H. Farrer has dealt with this subject; but when he wrote, the Bankruptcy Act of 1883 was still in the future.

[1] An unsuccessful experiment was made in 1697 by an Act, 8 and 9 Will. III., c. 18, which was repealed in the next year.

might make us believe that once every decade it will be admitted that the existing law is a disgrace to us, that a new code will be introduced and welcomed by all practical men, and that then the dismal tale will repeat itself. But beneath what seems a hopeless periodicity, there has been steady progress towards the doctrine that a man's inability to pay his debts is a matter of public concern, and not a matter merely between him and his creditors. There have been backslidings, due to a reaction against the bad old law about imprisonment for debt. It became fashionable to say that law begins by treating insolvency as a crime, and ends by treating it as a matter in which the state has no other interest than that which it has in all civil litigation. But still one can trace in the statute book the growth of the opinion that insolvency, though not a crime, and though possibly a misfortune, is a subject that the state must investigate in its own interest, since presumably it is the outcome of dishonesty.

The debateable question has been whether the body of creditors, acting by a majority and an elected representative, can be trusted to administer the debtor's affairs under the merely judicial supervision of a law court, without neglecting the interests of minorities and the interest of the state. If every creditor wanted just to get as large a dividend as possible then he would fairly represent the public interest; but what he wants is a maximum of dividend for a minimum of trouble, and this distinction is important. Between 1869 and 1883, an attempt was made to dispense with administrative officials, but the latter year saw the creation of a new and powerful organism, a body of Official Receivers, the salaried servants of a central bureau. Of these there

are some sixty-five; they are appointed and dismissible by, and answerable to, the Board of Trade. An official receiver is attached to a court or several courts having bankruptcy jurisdiction.

The scheme of bankruptcy courts differs somewhat from the scheme of ordinary civil courts, though it is made up of the same factors. For London (using that name in a large sense) the primary court is the High Court; one judge of its Queen's Bench Division is specially charged with the bankruptcy business, but many things can be done in the first instance by one of four Bankruptcy Registrars of the High Court; the appeal is to the Court of Appeal, and with its leave to the House of Lords. The rest of England is parcelled out into some 130 districts, each of which has for its bankruptcy court some county court, and thence the appeal is to a divisional court of the High Court, and with its leave to the Court of Appeal, whose decision will be final. There is no appeal at all unless £50 is at stake, or the court appealed from gives leave.

Now when there is a proved inability to pay debts, then at the instance of debtor or creditor, the court can make "a receiving order." The debtor is now on the high road to bankruptcy. The official receiver takes possession of his property, and summons a meeting of creditors. The debtor must be publicly examined in court touching his conduct, dealings, and property, and it is the receiver's duty to take part in this examination. A majority of creditors representing three-fourths in value of the debts may resolve that, instead of bankruptcy, some composition shall be accepted. But they cannot decide this finally; the matter must come before the court, and the court, which will have before

it a report from the receiver, may reject the scheme, because it is unreasonable or unfair to certain creditors, or because the debtor has been guilty of misconduct, *e.g.*, of inducing insolvency by hazardous speculation. If no arrangement be sanctioned, then the debtor will be adjudged bankrupt, and until discharged will be a disgraced man. He will not be able to sit in Parliament, his place as member of a municipal council, of a school board or the like, will be vacated, nor may he act as justice of the peace. If he obtains credit for £20, without disclosing the fact that he is bankrupt, he is guilty of a misdemeanour. While he is undischarged, whatever property comes to him belongs to his creditors. He can obtain his discharge from the court, and this will wipe out such debts as could be proved in the bankruptcy, and make him once more capable of owning property; but there is rigorous new law which if successful will mean that a debtor who is discharged has proved to the satisfaction of a court informed by a public inquisitor, that the insolvency was not due to criminal or non-criminal misconduct. In no bad sense we call the official receiver a public inquisitor, and such he seems to be. It is for him to investigate, for the court to decide.

Of the mode in which the debtor's property is collected and distributed this is no place to speak; naturally it is a complex matter. The object of our present law seems that of giving to the body of creditors and their elected trustee as large a control as is consistent with the detection of the debtor's misdoings, and the protection of the creditors themselves against professional harpies. But we may note that bankruptcy procedure lies now half way between civil and criminal procedure. One of

its admitted objects is to discover whether or not the debtor ought to be prosecuted for some one of those many forms of commercial misconduct that recent statutes have made crimes. A bankruptcy court cannot itself try the debtor for a crime; he will be tried in the ordinary way; grand jury and petty jury will be against him before he is convicted; but the bankruptcy court can commit him for trial, and order the Treasury Solicitor[1] to prosecute. Whether or no the new Act is succeeding is a question about which opinions differ; a trustworthy answer can not yet be given.

[1] See below, p. 146.

CHAPTER VIII.

THE COUNTY MAGISTRACY.

Turning now to our Criminal Justice and Police, we have first to notice that most thoroughly English of English institutions, the Commission of the Peace. This we owe to the fourteenth century. Along with that concentration of civil justice of which we have spoken there went a concentration of criminal justice. That such justice should not be in the hands of the sheriff—a resident provincial viceroy—had been an object of national striving; that it should not be in the hands of the feudal lords, the king was determined. So for a long while the shire was dependent on the occasional visitations of judges commissioned by the king, while what we may call its police was still under the sheriff's control. Clearly this organisation was very insufficient; there was a felt need of resident judges, and, in our terms, police magistrates. Many experiments were tried, and it seems long uncertain what form the new institution will take. Possibly the coroners represent one of these experiments, and one that has failed, for these officers elected by the county soon became of no very great importance. Then there appear some shadowy persons who bear the title of keepers or conservators of the peace, and

they also are, at least at times, elected officers. For a while the national mind seems bent on an elective magistracy, but in the end the principle of royal appointment prevails. From the year 1360 we may date the existence of justices of the peace as a definite permanent institution.

It grew with the nation's growth, and the sheriff who had become an annual officer fell into the background. Four times a year the justices at their quarter sessions could hear and determine criminal cases, trying with a petty jury those whom a grand jury indicted. The arrest of offenders, the suppression of riots and tumults, constituted another great department of their duty, and gradually they gained as the sheriff lost the control over the constabulary. But this was by no means all, for Parliament began to cast upon them business the most miscellaneous. Under the Tudors and Stuarts, the justices, their number always increasing, gradually became rulers of the county acting under the supervision of the King's Council and the King's Bench, and carrying into effect both judicially and administratively the many detailed statutes relating to police and social economy. The practice of committing to them all the affairs of the shire became habitual and still obtains. Within the present century, it is true, the province of the justice has in some directions been narrowed by the creation of other organs of local government.[1] Elected boards have been entrusted with many matters affecting public well-being, which an earlier generation, had it provided for them at all, would have consigned to the justices, but the judicial powers of the justices have

[1] See Citizen Series, Fowle, *Poor Law*, chaps. iii., iv.

steadily grown as the number of offences summarily punishable has rapidly increased.

To come to present times: those towns which have justices of their own being for a while neglected, the area over which a justice's commission extends is normally a county; in other words, each county has a separate commission of the peace; but besides the fact that each of the three ridings of Yorkshire, each of the three parts of Lincolnshire has its own commission, there are still a few exceptional districts, "liberties," which enjoy the same privilege.[1] From the first it was intended that the office should be held by great landowners of the county and at a later time a definite property qualification was established. At present, to put the matter briefly, an estate in land worth £100 a year or the occupation of a dwelling house assessed at £100 a year, will qualify a man to be a county justice; but privy councillors, peers, the eldest sons of peers, county court judges, and some other holders of public office, need not have this qualification. In old times it was the fashion to name among the justices some men learned in the law, without the presence of one of whom (*quorum*) certain business requiring legal skill could not be undertaken; these were the *quorum*; but in time it became usual to make all justices members of the quorum, and in this and other ways the distinction has lost its importance.[2] In old times again the justices were paid four shillings a

[1] Now that the liberty of St. Alban's has been merged in Hertfordshire, the Isle of Ely is the only liberty of any great extent; but the smaller liberties of Ripon and Peterborough have quarter sessions which do criminal justice as well as other business.

[2] For a long time it was customary to omit the name of *one* justice from the clause constituting the *quorum*, but even this last relic of the old practice has, I believe, vanished.

day for attending sessions, but for a long while past the office has in fact been honorary, and now it is so even in theory; patriotism, a love of public affairs, the honour and glory of the thing, have supplied names enough for a commission of the peace.

One member of the commission is appointed to keep the rolls—the records of the justices; in other words, he is Custos Rotulorum.[1] The Lord-lieutenant's was to start with a military office, which came gradually into being during the Tudor times as the expediency became apparent of having at the head of the county's military force some more permanent commander than an annual sheriff. As the appointment of a royal lieutenant became regular, and the creation of a standing army made the county militia of less importance, the office was in practice united with that of Custos Rotulorum. The Lord-lieutenant (though rather as Custos than as Lieutenant) became the honorary head of the county magistracy. It is usual, though by no means necessary, for him to be a peer. The appointment is regarded as a piece of patronage to be bestowed on a friend of the Ministry, but once appointed, though the Queen might at any moment dismiss him, he is generally Lord-lieutenant for life.

The justices are appointed by the Queen, that is, by the Chancellor, who commonly acts on the recommendation of the Lord-lieutenant. From time to time a new

[1] "*Shallow.* Sir Hugh, persuade me not; I will make a Star-chamber matter of it; if he were twenty Sir John Falstaffs, he should not abuse Robert Shallow, Esquire.

"*Slender.* In the county of Gloucester, justice of the peace and coram.

"*Shal.* Ay, cousin Slender, and Custalorum.

"*Slen.* Ay, and Ratolorum too."

commission is issued, or new names are inserted in the old commission.[1] The justices hold office during the Queen's pleasure, and can be dismissed without the assignment of any reason; but, as a matter of fact, a justice is not removed save for grave cause. Justices, it should be needless to say, can sit in either House of Parliament. The number of justices was once quite small—six or eight for a shire; it is now large indeed: but very many—perhaps one-half—of those who are named in a commission are but titular justices; they have not taken the requisite oaths and so become "acting magistrates." [2]

The commission of the peace, which still follows a form settled in 1590, is too wordy to be here printed. By it the Queen informs the justices that she has assigned them and every of them her justices to keep the peace within a certain county, and to keep, and cause to be kept, all ordinances and statutes for the good of the peace and the quiet rule and government of her people, and to chastise and punish all who offend against those ordinances and statutes. She then authorises them, or any two of them, to hear and determine all felonies and other crimes and offences of

[1] It is, I believe, the modern practice to issue a new commission (*a*) at the beginning of a new reign, (*b*) when a new Custos is appointed, (*c*) when the old commission is so full of names that further interpolation is impossible.

[2] Elaborate statistics are given in Parliamentary Papers, 1856, vol. l. I do not think there has been an exhaustive official return for many years. The following numbers of "acting magistrates" are taken from recent directories: Rutland 25, Nottinghamshire 108, Monmouth 144, Cornwall 155, Derbyshire 186, West Riding 422, Lancashire above 800. It is, I believe, usual to name all privy councillors in every commission, and also to put all the judges in every commission by a generic description.

which justices of the peace ought to inquire. A reader not versed in legal history would make but little out of the words of the commission, and in truth the duties of the modern justice are for the more part either created or at least regulated by statutes passed long after those words had become stereotyped.

We cannot read without amusement the complaint of an Elizabethan writer touching the vast mass of statute-law with which the justices had been burdened. He feared their backs would be broken by these "not loads but stacks of statutes."[1] Since his day English gentlemen have shown that their backs are pretty broad. All his poor little "stacks of statutes," when set beside the products of modern legislation, would be a molehill beside a mountain. Long ago lawyers abandoned all hope of describing the duties of a justice in any methodic fashion, and the alphabet has become the one possible connecting thread. A justice—if we trust our text-books—must have something to do with "Railways, Rape, Rates, Recognisances, Records, and Recreation Grounds;" with "Perjury, Petroleum, Piracy, and Playhouses;" with "Disorderly Houses, Dissenters, Dogs, and Drainage." This haphazard arrangement is probably unavoidable; for, as a great German writer has said,[2] the functions of the English justice are as multifarious as those of the modern state. It is easy to suggest that at least a distinction between judicial and administrative functions is possible, and between extreme cases the distinction is obvious enough. But often the line of demarcation is uncertain or obscure. For instance, the licence of justices is required for many

[1] Lambard, *Eirenarcha*, Bk. I., cap. 7.

[2] Gneist, *Self-Government*, § 33.

purposes, and nothing but a study of the statute which makes it needful will tell us whether it must be granted as the applicant's due so soon as certain facts are proved, or whether, and within what limits, there is a discretionary power of refusing it. Our local government has been carried on with judicial forms and in a judicial spirit. Our county rulers have been, not prefects controlled by a bureau, but justices controlled by a court of law. In separating, therefore, a justice's judicial from his administrative functions, we run some danger of putting asunder what law and history have joined together. Still, the question is fair: What sort of things has a justice to do?

I. Four times a year, at dates determined by statute, the justices hold a court of general sessions of the peace for the county—*Quarter Sessions*. Similar courts can be held at other times, and are then called *General Sessions*; but the distinction is of little moment, and it is not uncommon to speak of all such sessions as quarter sessions. Two justices are enough to constitute such a court, but, in fact, a considerable number of justices from all parts of the shire attend, and the meeting is a law-court and governmental assembly for the whole county.[1]

(*a*) It is a court with high criminal jurisdiction, which can try all crimes save an excepted class reserved for yet higher courts. That class (which is likely to be curtailed rather than extended) includes all capital crimes, all crimes for which a person not previously convicted may suffer penal servitude for life, and a number of the more serious misdemeanours—perjury, forgery,

[1] In some counties quarter sessions are held only at one town; in others at two or more.

bribery, libel, and some others.[1] The trial is a formal trial, with a petty jury of those indicted by a grand jury, and is just like a trial at the Assizes. The justices elect their own chairman, and he performs many of the duties which at the Assizes would be done by the judge. He charges the grand jury, sums up the evidence, pronounces sentence; still, the sentence is that of the whole court, and he is but the first among equals.

(*b*) Then this is the court to which there go appeals from the convictions and orders of those "Courts of Summary Jurisdiction" of which hereafter. There is no general right of making such an appeal; the right, if it exists at all, must be given by statute; still, there very commonly is such a right, especially when a conviction leads to imprisonment without option of a fine. These appeals are heard without jury.

(*c*) Complaints against local rating supply Quarter Sessions with much business. The recent creation of assessment committees, constituted of poor-law guardians, has provided what may be called a tribunal of first instance for the hearing of such complaints, to which Quarter Sessions serve as an appeal court.

(*d*) As will be seen below,[2] the justices assembled at Quarter Sessions exercise an important control over the county constabulary.

(*e*) Then, again, they form a council (a "local authority," as the statute-book has it), to which many statutes, old and new, have assigned powers and duties of a governmental kind. Sometimes their function is

[1] About half of the criminal trials take place at county sessions, about a quarter at borough sessions, the rest at the Assizes or the Central Criminal Court.

[2] P. 111.

directly executive, sometimes supervisory. It is hard to find apt abstract words, but the maintenance of the county bridges is an old, the slaughter of cattle infected with foot-and-mouth disease is a new, example of business which is under the immediate ordering of the Court of Quarter Sessions, while over highways its power is less direct, though it can constitute the highway districts, and compel the board that governs such a district to do its duties. Then it levies rates, whereout it defrays the costs of this county business, and also in the first instance the cost of the county police-force and of criminal prosecutions, though much of this is paid in the end out of the national exchequer.[1] Again, not only does it issue particular orders and make particular appointments (as when it places a district under the ban as "a place infected with pleuro-pneumonia;" when it divides the county into petty-sessional districts, into coroners' districts, into polling districts; when it appoints a county analyst and inspectors of weights and measures), but it can make general rules touching the use on highways of bicycles and locomotive engines; touching the verification of weights and measures; touching the fees to be taken in courts of summary jurisdiction. Such work brings it under the control of the great central offices—the Privy Council, Home Office, Board of Trade, Local Government Board. It has lately lost the direct government of the prisons, which, as national, not county, business, has been transferred to the Home

[1] County expenditure is thus classified: (1) police, (2) prosecutions, (3) reformatories, (4) lunatic asylums, (5) shire halls and judges' lodgings, (6) militia storehouses, (7) county bridges, (8) contributions for main roads, (9) register of electors, (10) salaries of county officers.

Secretary and Prison Commissioners; but at Quarter Sessions the justices appoint from out their number a committee bound to visit the prisons at frequent intervals, to hear complaints, and to report abuses. Another visiting committee manages the lunatic asylum, which is provided at the cost of the county. Another committee can confirm, or refuse to confirm, new licences for the sale of strong drink granted at petty sessions. These are but illustrations and examples.

II. The justice's commission comprehends the whole county; still there has been in fact a minuter localisation. Many statutes required that this or the other matter should be done out of Quarter Sessions by two justices, and a meeting of two or more justices about such business came to be called a *Petty Session*. Further, it was required that some duties should be performed at fixed intervals, and the meetings thus required by statute got the name *Special Sessions* or *Special Petty Sessions*. Naturally a justice looked chiefly after his own neighbourhood, and for some purposes this division of labour was recognised by law. But geography having become obscure, the justices at Quarter Sessions were in 1828 empowered to divide the county into tracts for the purposes of the special sessions. Then in 1836 there was an attempt to make the "petty sessional division" coincident with the then new "poor-law union." The coincidence could be but rough, since the latter often transcends, while the former cannot transcend the county boundary. In 1881 the number of these sessional divisions was 715. Practically in each division we shall find a number of resident justices who seldom, if ever, act except in that division or at Quarter Sessions, who have a court house for the division at which they meet

periodically, who have their own elected chairman, who, in short, constitute "the bench" of that division. But this is rather a matter of "custom, courtesy, and convenience" than of law.[1] For all, or at least most, judicial purposes, the shire is an undivided whole, and a case that can be heard by two justices can be heard by any two. For some administrative purposes, *e.g.*, the granting of licenses, the division is a unit; matters connected with that district can only be done at sessions held in and for that district.

(*a*) That summary jurisdiction (*i.e.*, jurisdiction exercised by a magistrate or magistrates determining fact and law without a jury), which is yearly becoming of greater importance, grew up in a curious accidental fashion. Statute after statute prescribed that this and that petty offence might be punished sometimes by one justice, sometimes by two or more, but very seldom was the slightest hint given as to how, or when, or where, the case was to be tried. Only in the present century have we begun to think of the summary jurisdiction as normal, and to regulate by general statutes the mode in which it must be exercised. The effect of modern legislation has been that no sentence save the pettiest (the maximum is a fortnight's imprisonment or a twenty-shilling fine) can be inflicted, save after a trial before at least two justices sitting in some place regularly appointed for such business, "a petty sessional court house." For a tribunal thus constituted we have the new technical name "a Petty Sessional Court." Some sentences within the limit just mentioned can be inflicted by two justices in a place less formally devoted

[1] Any one who wishes for a fuller and better account of these matters should read Mr. Knox Wigram's *Justices' Note Book*.

to judicial business ("an occasional court house"), which none the less must be open to the public, and some can be inflicted by a single justice at a petty sessional court house; in these last instances the tribunal is "a Court of Summary Jurisdiction," though not "a Petty Sessional Court."[1] The times for holding courts for the exercise of this summary jurisdiction are not fixed by law, but are arranged by the justices. For some large towns a court will be formed daily; in the open country fortnightly intervals are common.

For the more part, the justice thus done is of a penal kind, and results in the infliction of fines or imprisonment, and of this hereafter;[2] but in some cases its exercise can be accompanied by an award of amends or compensation to the person injured, and, in a few, the court has a true civil jurisdiction. It can give a civil remedy in a dispute between employer and workman, within a £10 limit; a seaman's wages if less than £50, water rates, gas rents, cab fares, can be recovered before it. Orders directing men to pay money for the support of their illegitimate children (bastardy orders) are a staple commodity of Petty Sessions. Accessible as are the County Courts, they are not accessible enough for all these purposes.

(*b*) Orders for cutting down a tree which overhangs a highway, for the destruction of meat unfit for food, of obscene books, of dangerous dogs, for the removal of a corpse to a mortuary, of a pauper to his place of settle-

[1] "A Court of Summary Jurisdiction" is the genus whereof "a Petty Sessional Court" is the species. Both terms are quite modern. As will be noted below, a stipendiary magistrate has the power of two justices.

[2] See below, p. 125.

ment, for closing a polluted source of water supply, are specimens of orders which justices (sometimes one justice) can make, and in this region we pass almost imperceptibly from judicial to administrative business. And so with licensing: besides the intricate system of licenses for the sale of drink, pawnbrokers, keepers of billiard rooms, storers of gunpowder and of petroleum, agricultural gang-masters, baby-farmers, require licenses.

(*c*) Then, in some cases, justices in Petty Sessions are, for their division, the "local authority" entrusted for certain purposes with thoroughly administrative work; gunpowder, petroleum, baby-farms, would again supply us with instances. The appointment of overseers of the poor, the allowance of poor-rates, the settling of the jury lists are business of a somewhat similar kind.

III. The preliminary inquiry in criminal cases, the discharge or commitment of the accused, form another great branch of a justice's duty which will demand attention hereafter.[1] This has nowadays become regular judicial work, though it can be done by a single justice, and by one not sitting in open court.

IV. Closely connected with this is the issuing of warrants for the apprehension of accused persons. There are many warrants, too, for the searching of houses and the like that a justice can grant; some for the purpose of detecting serious crime, as when there is search for stolen goods or counterfeit coins, some for the detection of minor offences, offences against the Factory Acts, the keeping of a gaming house, and so forth; pawnbrokers and old-metal dealers are specially liable to visitations under a justice's warrant.

V. To keep the peace is the justice's oldest duty. It

[1] See below, p. 129.

is now performed chiefly by means of orders given to police constables, but on occasion the justice is himself expected to intervene and quell disturbance, to appoint special constables, to call in military force, and the like. Whenever twelve persons are riotously assembled, the justice should resort to the place where the disturbance is, and among the rioters, or as near to them as he can safely come, read a certain proclamation bidding them disperse in the Queen's name (this is called "reading the Riot Act"), and if thereafter they continue rioting by the space of one hour, they are felons, who can be sent into penal servitude for life.[1]

VI. In countless other ways has the justice of the peace been made useful; for instance, in superintending the enlistment of soldiers, the billeting of troops, the impressment of carts for military service, the relief of the poor in urgent cases, the restraint of lunatics. In a word, he is the state's man of all work.

That all this multifarious business should be transacted by amateurs is of course only possible because the justices have assistants who contribute professional knowledge, and are skilled in the due routine. There is first the Clerk of the Peace for the county, dismissible only for misconduct, appointed by the Custos Rotulorum, or, should he make no appointment, then by Quarter Sessions. He has in his hands all the secretarial work of the county, and most miscellaneous work it is; indeed, he is the centre of the whole system. Then each petty sessional division has its clerk to the justices. Under modern statutes the clerks are to be paid by salaries, and the fees which used to be their reward (for even criminal business is not done without some taking of court fees)

[1] *The Riot Act* is Stat. 1714 (1 Geo. I., stat. 2, cap. 5).

go to the county treasury. Projects for the transfer to elected boards of the more purely administrative functions of the justices are in the air, and undoubtedly for such projects there is much to be said, but whether they will not destroy the county magistracy must be a serious question. Of that magistracy we can still write with Sir Edward Coke, "It is such a form of subordinate government for the tranquillity and quiet of the realm, as no part of the Christian world hath the like, if the same be duly exercised." [1]

[1] *Fourth Institute*, p. 170.

CHAPTER IX.

BOROUGH JUSTICES AND PAID MAGISTRATES.

To be exempt from the shire organisation was long the ambition of the English town, and divers boroughs acquired by royal charter the privilege of having their own justices of the peace. Of these *justices by charter*, who were usually elected officers, there is no need to speak, for the country was practically purged of them by the Municipal Reform of 1835, and the last relics of the old state of things are at this moment being swept away.[1] In 1835, all the most considerable of the then incorporated boroughs, to the number of 178, were reconstituted according to a uniform model, and since then a corporation of the same type has been created in many other towns. But about 106 places which claimed an organisation of a more or less municipal kind were not included in the reform; in some the corporation had ceased to exist, save as a name, while others were passed by as unimportant. These retained, and retain, in fact or theory, their old constitutions, and at this hour there are still some decayed towns which have unreformed corporations and elective magistrates endowed with a high criminal jurisdiction which they never exercise. But

[1] Statute, 1883, chap. 18.

their doom is sealed. At latest on Michaelmas Day, 1886, these corporations will perish, these towns will become mere bits of county, unless, in the meantime, they obtain royal charters, which will turn them into municipal boroughs of the now orthodox type. So (with a saving for the still unreformed city of London) we have only to speak of what may be called the new-fashioned municipal boroughs, and we have only to consider them as units in a system of Justice and Police.[1]

These boroughs fall into three classes: (1) those which have no separate Commission of the Peace, (2) those which have such a Commission, but no Court of Quarter Sessions, (3) those which have the separate Commission, and also Quarter Sessions.[2] To take the most exalted class ("quarter session boroughs") first: these have indeed a Court of Quarter Sessions, but this is a court in which there is but a single judge, namely, the Recorder of the borough, and he is no amateur justice. He is appointed by the Queen from among barristers of five years' standing, he holds office during good behaviour, and the borough pays him a salary which in practice is hardly more than nominal, for the office is honourable and not very burdensome, nor does it prevent its holder from practising as a barrister. He holds the Quarter Sessions four times a year, and his main business is that of trying with a jury those crimes committed within the borough, which are not of the class reserved for the higher courts.[3] The jurors at the Quarter Sessions for

[1] As to the constitution of the municipal borough, see *Citizen Series*, Chalmers, *Local Government*, chap. v.

[2] The number of boroughs in each of the three classes is approximately (1) 46, (2) 100, (3) 105.

[3] See above, p. 85.

these boroughs are burgesses, and the expense of prosecutions falls, in the first instance, on the borough. For purposes of local finance the distinction between these and other boroughs is of importance, but this does not concern us.

Then for every borough there are normally, at least two justices of the peace. The mayor, who is elected by the council, is justice by virtue of his office, and unless he becomes disqualified, he is justice for one year after he ceases to be mayor. But to most boroughs, except the smallest, the Queen has granted a separate commission of the peace. The number of names in the commission varies from the seventy or eighty justices of Liverpool and Manchester to the five or six of little towns. These justices, like the county justices, are appointed by the Queen (Lord Chancellor), are unpaid, and hold office during good pleasure. While acting, such a justice must reside in the borough or its outskirts, or have a house, warehouse, or the like in the borough, but no property qualification is required of him and he is not entrusted with any high criminal jurisdiction, for as already said, even if the borough has Quarter Sessions of its own, the professional recorder will be the one judge of that court. The borough justice has, however, for his borough many of the powers that a county justice has for his county; the summary jurisdiction, the preliminary examination of criminals, the issuing of warrants of arrest, the conservation of the peace, and so forth, are his. But in general the county justices also can exercise these same powers in and for the borough; the borough is but a part of the county which has some additional justices of its own. This is always the case if the borough has no Court of Quarter

Sessions. Among the "quarter sessions boroughs" we find a further distinction, for here the question whether the county justice is excluded depends on the question whether he was excluded on the 9th of September, 1835, and this, again, depends upon the charters the borough had before that date; some such charters did, while some did not, forbid the intermeddling of the county justices, and this distinction is still preserved.[1]

It must be understood, however, that in boroughs, no matter to what class they belong, a great deal of business of the governmental kind, which for the county outside borough boundaries is done by justices at Quarter Sessions or Petty Sessions, falls to the elected Town Council. Thus, in the administration of the acts which aim at preventing cattle disease, the Town Council for the borough is co-ordinated with the Quarter Sessions for the county, while to protect the townsfolk against dangerous dogs the Town Council has the powers which justices in Petty Sessions exercise for the benefit of their sessional division. Again: a control over the borough constabulary resembling that which Quarter Sessions has over the county constabulary belongs not to the borough justices but, as will be seen hereafter,[2] to a "watch committee" of the Council.

Unless within less than two years Parliament takes the city of London in hand, that city will possess the one municipal corporation that does not conform to the modern model. Of that corporation as a governing

[1] A clause in a charter forbidding such meddling is generally called a "non-intromittant clause." This classification of the quarter sessions boroughs turns rather on their past good fortune than on their present importance. Liverpool, I think, does not exclude the county justices, while Windsor does.

[2] See below, p. 112.

body we have not to speak,[1] but many of its officers take an active part in the dispensation of justice. The mayor and each of the aldermen is a justice of the peace for the city which is a county in itself and outside the limits of the Middlesex commission. Any one of these city justices sitting at the Mansion House or the Guildhall has indeed some unusual powers, for he can hear many cases which could not be heard by less than two justices of a commoner type. This is the provision which the civic constitution makes for summary justice and for the preliminary examination of criminal cases. Then the mayor and aldermen are nominally justices of the Central Criminal Court, which has jurisdiction over all crimes committed within the city and a large circumjacent territory. They do not take any real part in the trial of such cases, but much of the work is actually done by the Recorder of the city, who is elected by the aldermen, and by the Common Serjeant and the judge of the City of London Court, who are elected by the Common Council, the very gravest cases being usually reserved for a judge of the High Court. The Recorder, again, sits as judge in the Mayor's Court, which has jurisdiction in civil cases arising within the city, while the City of London Court has become in fact a county court of the new pattern having the city for its district.

From these institutions distinctive of London proper, we pass to one which was long distinctive of "the Metropolis," for as yet we have no better name for the vast town which has agglomerated itself outside the city walls. This town, we must remember, was in the eye of the law no town; it had no legal being;

[1] See Chalmers, *Local Government*, p. 145.

it was but a collection of townships and manors, parishes and extra-parochial places, which owned no common ruler save King and Parliament. Geography and remote history had done their worst for the Metropolis: the commissions of the peace for Middlesex, Surrey, Kent, and Essex, converged on the disorderly mass, while separate commissions for Westminster and the Liberty of the Tower confounded confusion. Unity of action was impossible, the individual magistrate was not controlled by the spirit of corporate magistracy, and metropolitan Justice and Police fell into bad ways. In the last century there arose men who gained the bad name of "trading justices," and made a profit of their powers by the taking of fees. To put an end to this, rather than to do anything else was the object of a series of statutes, which ended by giving us professional magistrates and a new police force under the control of Royal Commissioners and the Home Secretary.

In 1792 seven "public offices," which came to be called "police offices," were established, at each of which three justices of the peace, appointed by the King and commissioned for both Middlesex and Surrey, were to attend daily. All fees taken by them were to be paid to a receiver, and no other justice was to take fees within a certain large district. Out of these fees, or, if they would not suffice, out of the consolidated fund, each of the twenty-one justices was to be paid a salary of £400, while over the provision of buildings and so forth the Home Secretary was to have a control.

An Act of 1800 established an eighth police office (or rather a ninth, for the Bow Street Office has an earlier history); and the three paid justices ("special justices" they were called) of this Thames Police Office were to

be commissioned for Middlesex, Surrey, Kent, Essex, Westminster, and the Tower.[1] These Acts were only temporary, but they were repeatedly re-enacted with improvements. The salary of these justices, or "police magistrates," as the later Acts call them, slowly grows from £400 to £1,500; the hours of attendance, on the other hand, are shortened; at first they are 10 to 8, afterwards 10 to 5. What this indicates is the great change which during this period is making the duties of the justice in criminal cases more and more judicial. These paid justices were seldom lawyers; it is first in 1839 that the King's choice is confined to barristers of seven years' standing.[2] One of their chief duties had been to appoint and control a small band of paid constables attached to each office. Even in 1829 when "a new police force" for "the Metropolitan Police District" was formed, this was done by establishing in Westminster one more police "office," provided with two paid justices of the peace, who, under the Home Secretary, were to rule the new constabulary. In 1839 these two "justices" receive the new name of "Commissioners of Police of the Metropolis;" the judicial and executive duties comprised in the old conservation of the peace fall apart, and we are left with learned magistrates and gallant commissioners.

In the Metropolis there are now twenty-three police

[1] Bentham (*Works*, Vol. V., p. 335) says that he drew this Act; "without the change of a word it became law." A sketch of the Bill will be found in Vol. X., p. 331. The Act is chap. 87 of 1800.

[2] "There were only three barristers; the rest were composed of a major in the army, a starch maker, three clergymen, a Glasgow trader, and other persons who, from their occupations, could not but be considered as utterly unqualified to perform the duties of magistrates." See a speech by Sir Robert Peel in Bentham, *Works*, Vol. V., p. 346.

magistrates, each of whom is a justice of the peace for Middlesex, Surrey, Kent, Essex, Hertfordshire, Westminster, and the Liberty of the Tower. This is the territory over which he has jurisdiction, but his warrants for the apprehension of suspected persons and the like can, without endorsement, be executed outside that territory. Sitting in his Police Court he is for many purposes equivalent to two justices acting concurrently, and, indeed, has a few powers which no other justice has. There are now within the metropolitan limits thirteen "Police Courts" (a phrase which in the statute book gradually supplants "police offices"), each of which has its own magistrates assigned to it, but for modifying this system the Home Secretary has considerable powers. It has been regarded as a matter of national concern and the cost of it falls on national funds, which, however, get the benefit of fines and penalties which in other places would go to the treasury of the county or borough. When a Police Court has been set up and a district assigned to it, that district becomes to a large extent exempt from the interference of the justices for the county, Middlesex, Surrey, or whatever it may be: so that for what we ordinarily call London (save the City), the summary jurisdiction and the preliminary examination of criminals are now in professional hands.

Besides the institution of a paid magistracy and the creation of the Central Criminal Court,[1] the vast volume of the Metropolis has caused another modification of the general English system. Quarter or General Sessions of the peace for Middlesex are held twice a month, and since 1844 there has presided at these sessions for

[1] See below, p. 160.

the hearing of appeals and of criminal cases a paid "Assistant Judge;" he is appointed by the Queen, and his salary is defrayed half by the nation half by the county.

Other places have followed the example of London in acquiring stipendiary magistrates. So early as 1813 Manchester obtained such a magistrate. Then, in 1835, a general provision was made for the reformed boroughs; they might have stipendiary magistrates if they chose to ask for them and pay for them, and a like provision has since been made for populous places which are not boroughs. In such cases the magistrate is appointed by the Queen, must be a barrister of seven (or in some instances five) years' standing, and is paid out of local funds. These "stipendiaries" do not hold office by the judicial tenure of good behaviour, they, like other justices of the peace, are only justices during the Queen's good pleasure. Considering that for the last fifty years it has been open for any large town to equip itself with a paid magistrate, we are bound to suppose that Englishmen are well satisfied with the unpaid and unprofessional justices of their counties and boroughs, for the number of places which have called a lawyer to their aid is very small.[1]

We must not end this account of the justices, paid and unpaid, without mentioning that supervisory control

[1] The following list of places having paid magistrates is, I believe, correct; in some cases there is a special Act of Parliament: Birkenhead, Birmingham, Brighton, Cardiff, Hull, Leeds, Liverpool, Manchester (city), Manchester (division), Merthyr Tydvil, Middlesborough, Pontypridd, Salford, Sheffield, Staffordshire Potteries, Swansea, West Ham, Wolverhampton. For Chatham and Sheerness there is a magistrate paid by the nation, whose jurisdiction extends over the estuary of the Thames.

which the Court of King's Bench exercised over all inferior courts, a control which has been inherited by the High Court. The scope of this control comprises all the inferior courts, the County Courts, for example; but it is of special importance in connection with the magistracy. This traditional power is quite distinct from any appellate jurisdiction that statutes may have given to the High Court. That court, for instance, has by statute power to hear appeals on points of law from the County Courts, and from the Courts of Summary Jurisdiction; but, apart from this, the High Court controls all inferior courts, ordering them (by writ of *mandamus*) to hear and determine cases which are within their competence, prohibiting them (by writ of *prohibition*) from meddling with matters which are beyond their competence, and taking to itself (by writ of *certiorari*) any case in which there has been or is like to be a failure of justice.

The nature of this control is perhaps best illustrated when the High Court enforces against some justice or judge of a lower court the rule that no one biassed by pecuniary interest should act as judge. Since the days when "the Mayor of Hereford was laid by the heels" for sitting as judge in his own cause, this rule has been applied with a rigour which, were the principle at stake not so important, might seem pedantic. Nor is it applied only to "inferior courts;" the House of Lords has applied it to the decree of a Lord Chancellor,[1] but it

[1] On which occasion Lord Campbell said, "It is of the last importance that the maxim, that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest. . . . We have again and again set aside proceedings

is constantly applied to justices of the peace; they are summoned, in the Queen's name, to show cause why the proceedings taken before them should not be brought into the High Court and there quashed, *i.e.* made void. We have here no appeal by a defeated litigant who brings his adversary from a lower to a higher tribunal, but a matter between the Queen on the one side and some of her justices on the other. To secure a full and fair hearing of every case before magistrates who have no sinister interest and who are legally competent to decide the case, rather than to secure correct decisions of questions of fact or law, has been the object of the control which the High Court by means of royal writs exercises over the lower courts. Especially important has been the writ of *certiorari* for removing proceedings from the lower courts to the High Court in order that the latter may be certified thereof and do justice therein, and though in not a few cases statutes have in general terms "taken away the *certiorari*," *i.e.* have directed that certain proceedings shall not be removed, still it is considered that even then the writ can be issued if the lower tribunal plainly exceeds its powers or acts in a flagrantly irregular way.

in inferior tribunals, because an individual who had an interest in a cause took a part in the decision. And it will have a most salutary influence on these tribunals when it is known that this High Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account not according to law, and should be set aside." (3 *House of Lords Cases*, 759-793.)

CHAPTER X.

THE CONSTABULARY.

It may seem to us a matter of course that there is a large body of policemen, highly organized on a military plan, paid to maintain order, detect crime and arrest offenders.[1] But all this is very new; it has come into existence during the last sixty years; indeed, down to 1856 there was no law for the whole of England requiring that there should be paid policemen. The general law was that every township should have its constable. To serve his turn in that office was the duty of every man of the township, and to serve (certain lawful fees excepted) for nothing. In places where the old local courts survived the constable was elected by his neighbours; elsewhere he was appointed by the

[1] The word *police* did not, I think, become common until late in the last century. Johnson just admits it, but only as a French word used in England; for him *police* is "the regulation and government of a city or country so far as regards the inhabitants." The group of words, *police, policy, polity, politics, politic, political, politician*, is a good example of delicate distinctions. I hardly dare venture a definition of *police*, but will suggest, "such part of social organization as is concerned immediately with the maintenance of good order, or the prevention or detection of offences." *The Police* as an equivalent for *the police force, the body of police constables*, is very modern.

justices; the man chosen might provide a substitute. The constable had a good many small statutory duties to do, and a general duty of obeying the lawful orders of the justices, but his main "common law" duty was to arrest offenders, and for that purpose he had some powers which the private man had not. These are still important; it is mainly because he is a constable, an officer long known to the law, that he whom we call a policeman differs from other men.

The last century which did most of its legislation by means of local Acts, provided in this place and that divers more or less efficient supplements for this rude institution, paid watchmen for the towns and so forth, but these, though interesting, we must pass by as temporary expedients which have left few traces on our present law; we can pass from the constable of the common law to the constable of those yet recent statutes which have created the new police force.[1]

So late as 1842 a gallant effort was made to put new life into the old constabulary.[2] The general principle was placed upon the statute book that in the country at large every able-bodied man resident within any parish between the ages of 25 and 55, rated to the poor rate or county rate at £4 or more, is liable to serve as constable for that parish, unless specially disqualified or exempted. But the list of exemptions was comprehensive; men of the professional class had no mind for constabulary duties. On the statute book that principle remains written; but it has become a dead letter. The machinery provided was briefly this: lists of persons liable to serve

[1] By far the best history of the English constabulary known to me is in Gneist, *Self-Government*, § 77–82.

[2] Statute, 1842, chap. 109.

for the parish are annually drawn up by the overseers of the poor; these are submitted to justices holding a special session for the division, who thereout choose and appoint for each parish so many constables as they think needful; substitutes are allowed; a man who has served in person or by substitute is exempt until every other parishioner liable to serve has taken his turn; within the county and all adjoining counties this constable has all the powers of a constable, but he is not bound to act outside his parish without the special warrant of a justice; he may earn certain fees, otherwise he is unpaid. Thirty years later, "the establishment of an efficient police in the counties of England and Wales has rendered the general appointment of parish constables unnecessary," so, for the future, no parish constable shall be appointed unless the justices at Quarter Sessions think this necessary.[1] The Act of 1842 can still be enforced if need be; the able-bodied man, not specially exempted, is liable to be constable of his parish or to find a fit substitute; but this statute seems as obsolete as the laws of Ethelbert. We have been living very fast.

But though we have now a professional police force and the old parish constabulary has vanished, still under an Act of 1831[2] there is a machinery for compelling men to serve as special constables, and this we ought to notice, as it might on occasion be employed. On the oath of a credible witness that any riot or felony has taken place, or may be reasonably apprehended, two justices can appoint as special constables any persons resident in the neighbourhood who are not exempt from serving the office of parish constable. A Secretary of State can order that even the exempt shall

[1] Statute, 1872, chap. 92. [2] Statute, 1831, chap. 41.

be made constables, and can himself direct that special constables shall be appointed throughout the county. To refuse to serve, or to disobey lawful orders, will subject the appointed constable to a £5 fine. The special constable will have the same powers, and enjoy the same special protection that law gives to the ordinary constable.

A full history of the new police would probably lay its first scene in Ireland, and begin with the Dublin Police Act passed by the Irish Parliament in 1786.[1] There were to be paid constables in Dublin endowed with large new powers under the orders of three "commissioners of police." In 1787 another act was passed for Ireland in general, and thenceforward there was legislation which in the end established a "Royal Irish Constabulary." What was called the Middlesex Justices Bill of 1792 was a copy in faint colours of the Dublin measure.[2] The paid "justices" at each of the seven "public offices" were to appoint six paid constables; the maximum wage was 12*s.* a week. Numbers and wages increase; in 1802 there are eight constables at 16*s.*; in 1811 there are twelve at a guinea; in 1813 the Home Secretary settles the wages; in 1821 the number is to be "sufficient." Other paid officers there are, "the horse patrole," the parish watchmen, all tending to come more under the control of the new justices (police magistrates) and of the Home Secretary.

In 1829 a new Metropolitan Police force is created,[3]

[1] Irish Stat., 26 Geo. III., c. 24. See Froude, *English in Ireland*, B. vii. c. 2.

[2] See above, p. 99.

[3] It is, I suppose, unnecessary to explain why the policeman is a *bobby* and a *peeler*.

and it has become expedient "to constitute an office of police, which, acting under the immediate authority of one of His Majesty's principal Secretaries of State, shall direct and control the whole of such new system of police." Two persons are to be appointed to execute the duties of a justice of the peace at the said office. Ten years later and these two justices have become "Commissioners"; in 1856 these two Commissioners give way to one Commissioner and two Assistant Commissioners, ruling a Metropolitan Police District which has grown rapidly since it was first formed, but a district in which the city of London is an exempt island.

That city did not lag long behind; an Act of 1839 created for it a constabulary of the new type, but put the force very much under the control of the civic corporation. Meanwhile occasion had been taken of the great municipal reform to insist that each new-fashioned borough should have a body of paid constables governed by a committee of the town council. In 1839 a permissive Act enabled justices at Quarter Sessions to create a paid county constabulary. Then there was a long struggle; some counties did, some did not adopt the Act; many maintained to the last that the new force was unnecessary. This time of hesitation was ended by a statute of 1856; in all counties which had not yet availed themselves of the old Act a new constabulary was to be created next winter. Thus was England policed. On the Home Secretary's certificate that during the past year a county or borough force efficient in number and discipline had been maintained, a sum not exceeding a quarter of the cost of paying and clothing the constables was, if the Treasury thought fit, to be borne by the nation, while the residue would fall on the county

or borough. In 1875 the restriction which limited this Treasury subvention to a certain fraction of the cost was suspended for a year; yearly since then it has been suspended for another year; in fact the Treasury now pays half the cost.[1] To carry out this plan of aiding out of national funds those places which maintained efficient constabularies, three Royal Inspectors were appointed who yearly review the county and borough establishments, men, police stations, and so forth, and report thereon to the Home Secretary.

Thus the police forces of England are (1) the metropolitan force, (2) county forces, (3) borough forces, (4) the city of London force;[2] the last we must pass by; the general constitution of the others should be noted.

(1) The territory of the metropolitan force is in area but a small part of England, still it has for its share more than a sixth of the whole population, a quarter of the crimes, a third of the policemen.[3] Now here there

[1] For the year ending Michaelmas, 1883, £1,322,526 was paid from national revenue. The total charge of the police was £3,367,678, which, however, includes many items besides pay and clothing of constables. The City of London enjoying an honourable independence receives nothing from the public purse.

[2] In 1882–3, the numbers of the men in these several forces were: (1) 12,663, (2) 11,255, (3) 9,685, (4) 885; total, 34,488. Population (last census), 25,974,439.

[3] The Metropolitan Police District includes, I believe, every parish (save the city) of which any part is within twelve miles of, or of which no part is distant more than fifteen miles from, Charing Cross. It must not be confused with (1) the aggregate of districts assigned to the metropolitan police courts, (2) the district of the Central Criminal Court, (3) the area subjected to the Metropolitan Board of Works. This police force has the charge also of certain royal dockyards remote from London, Woolwich, Portsmouth, Devonport, Chatham, Pembroke.

is perfect centralization, no "local authority" has anything to do with the system. A Commissioner and two Assistant Commissioners holding office during the Queen's pleasure regulate and command, appoint and dismiss the constables, but a supreme supervisory control is given to the Home Secretary. What is more, the peculiar circumstances of modern London have made necessary the subjection of this huge town to a police regimen such as exists in no other part of England. The Metropolitan Commissioner can make orders and regulations not only for his force but also for the public. He has liberal statutory powers for regulating street traffic, for licensing cabs, and so forth. For other towns similar, though less extensive, powers can be exercised, but they are entrusted to the town council or to an elected board and not to the commander of the police force. Schemes for giving the Metropolis a municipal constitution are now under discussion, but it seems improbable that the new corporation will be endowed with the powers of the commissioner; he has become very necessary to us.

(2) Over a county force the justices in Quarter Sessions have a considerable authority. They determined in the first instance the number of the constables to be employed, and it is they who, with the consent of the Home Secretary, can increase or diminish that number. They also with his approval appoint a Chief Constable, whom they can dismiss. This Chief Constable has the general disposition and government of the constables, subject to the lawful orders of Quarter Sessions and the Home Office regulations. It is for him with the approval of Petty Sessions to appoint, and it is for him at his pleasure to dismiss his subordinates. But the whole establishment is subjected to the general rules for the

government, pay and clothing of the constables which the Home Secretary can make from time to time, and this central control is brought home to the county by the Royal Inspectors, on whose report will depend the receipt of a Treasury subvention.[1]

(3) A municipal borough may if it pleases maintain its own police force, but if it has less than 5,000 inhabitants and takes this course, it will do so at its own expense, the Treasury can give no aid. Or again, its Council may agree with the county justices for a consolidation of forces, and the consolidated force will be commanded by the county's Chief Constable. Some considerable towns are content to be thus "policed by the county," and, on the other hand, some petty places prefer to "police themselves."[2] The Town Council from time to time appoints some (not more than a third) of its members to form with the mayor a "watch committee," which can act by a majority of those present at its meetings, provided there be three present. This committee appoints, dismisses, governs the constables. The chief officer of a borough force is called Head (not chief) Constable, but he is not so independent of the

[1] County forces there are 59; geography-book-counties, 52; deduct Middlesex, which is wholly within the metropolitan district, count Yorkshire for 3, Lincolnshire for 3, Sussex for 2, Suffolk for 2, and add Isle of Ely and Soke of Peterborough. In Rutland the chief constable commands 13 men, in Lancashire, 1,300.

[2] There are 164 borough forces or thereabouts, ranging in strength from the 900 men of Liverpool to the 1 man apiece of sundry small towns. Here is another distinction among boroughs which I think cuts all those mentioned in the last chapter. Gloucester, with a commission of the peace and quarter sessions, has no police force of its own; the Cornish St. Ives, without a commission of the peace, polices, or lately policed, itself.

watch committee as the chief constable is of the county justices.[1]

Though we have not then (perhaps we ought to add "as yet") one constabulary for the whole of England, still a great deal has been done to fashion at least all the larger constabularies on a single uniform model, a model that may be called military, with regular grades of subordination—superintendents, inspectors, sergeants, constables, with promotion from the lower to the higher ranks, a scheme of superannuation, and so forth, and the command of these forces is mainly in the hands of officers who have served in the army.[2] But hitherto the new institution has been successfully worked without subjecting the constable to a special penal discipline at all comparable to that to which soldiers are subject: there is no court-martial for the policeman. A county constable may be dismissed at the will of the Chief Constable. The Chief Constable if he thinks one of his men remiss or negligent in his duties can reduce him in rank or fine him one week's pay. If he resigns or withdraws from duty without a month's notice he forfeits arrears of pay, and on summary conviction before justices can be fined £5; on a summary conviction for any neglect or violation of duty he can be

[1] A *High* Constable, again, belongs to an older order of things; he is becoming extinct.

[2] As a fair specimen, take the West Riding force: chief constable (£700 a year), deputy chief constable (£190), chief clerk (£240), 21 superintendents (£150 to £190), 29 inspectors (£100 to £109), 127 serjeants (about 30*s.* to 34*s.* a week), 770 constables (about 23*s.* to 29*s.* a week). In the internal organization of the force, "constable" is the name for a man in the lowest rank; but generically all are constables, and a policeman's rank has very little influence on his legal relation to the public.

fined £10 or condemned to a month's hard labour; but on the whole he has been left very much to the general law, and if guilty of crime or minor offence can be treated like another offender.

It has been the English policy to separate police from politics, therefore the paid policeman, be he Chief Constable or of the lowest rank, is subjected to political disabilities. The county constable cannot vote for the county or any adjoining county, or any borough therein, and if he endeavours to influence the election by persuasion or dissuasion, he incurs a penalty of £20, to be sued for by the common informer; this is a good instance of the way in which the "popular action" has been used.[1] Nor, again, can his name be placed in any jury list.

Now hitherto the main office of the new constabulary as of the old has been to quell disturbance and to bring criminals and other offenders to justice, by arresting them and carrying them before a magistrate for preliminary examination or summary conviction, and of the power of making arrests we speak in the next chapter. But already Parliament has utilized this handy disciplined force for many miscellaneous purposes more or less directly connected with the prevention of offences. As a grave instance we may take what is called "police supervision." When a man is convicted a second time of felony, or certain of the worst misdemeanours, in addition to all other punishment he can be sentenced to be subject to the supervision of the police for seven years after he comes out of prison. During that period he will be bound to notify to the chief police officer of the district every change of his abode, and monthly to

[1] See above, p. 18.

report himself.[1] A convict who has been liberated on a ticket-of-leave has to do the same, and any failure to perform this duty will have for him very serious penal consequences. As a pettier instance we might note the law's dealings with chimney sweepers. In order to prevent the employment of children as climbing boys, one who would carry on the trade of sweeping chimneys must obtain a certificate from the chief police officer of the district. This, however, is mere registration, for the certificate cannot be denied; but at least in one case we have gone further. It is unlawful to follow the calling of a pedlar without a licence. He who wishes to be a pedlar goes to the chief police officer who, if satisfied that the applicant is of good character, will grant the licence; in case of a refusal there may be an "appeal" from this police decision to a Court of Summary Jurisdiction. Such an enactment as this shows that we are beginning to understand the manifold conveniences of a police bureau of the continental type; but at present we are still somewhat backward and prefer as licence givers the two or more justices to the chief officer of police.

In closer connection with the power of making arrests, there stand some other powers of the constable. He is the usual executant of the warrants which magistrates grant when there is to be search for stolen goods or the like; under warrants similarly granted it is he that can search the shops of pawnbrokers and old-metal dealers, and there are now cases in which an authority in writing from the chief police officer of the district will serve as well as a magistrate's warrant. In the Metropolis, too, the Police Commissioner can order a superintendent and

[1] In 1883, 1448 persons were sentenced to police supervision.

constables to enter an unlicensed theatre and to take into custody all persons who are there without lawful excuse. But without any warrant at all there are visitations which a constable can make. To prevent or detect certain violations of the Licensing Acts he may enter any public house, for example.[1] If it occurs to Parliament that steam threshing machines are dangerous things which ought to be fenced, then straightway "any constable may at any time enter on any premises on which he has reasonable cause to believe that a threshing machine is being worked contrary to the provisions of this Act for the purpose of inspecting such machine."[2] But all this is yet new and exceptional; a general system of police supervision is not to be created in a day.

But besides what he can do as constable, the modern policeman can very often do many things because some "local authority" has appointed him inspector under one of those modern acts of parliament which subject human affairs to authoritative inspection. Thus concerning the police of Northumberland we read:[3] "The superintendents are all appointed inspectors under the following Acts: Weights and Measures, Food and Drugs, Explosives, and Contagious Diseases (Animals), under which last named Act, three inspectors, five sergeants, and two constables are also appointed inspectors. One sergeant is appointed inspector of cattle trucks on the

[1] An Act of 1872 (chap. 94, sec. 35) contained this sweeping provision: "A constable may at all times enter any licensed premises, he may also examine every room and part of such premises, and take an account of all intoxicating liquor stored therein." In 1874 this counsel of perfection was mitigated.

[2] Statute, 1878, chap. 12.

[3] Report of H.M. Inspectors of Constabulary, 1884, p. 175.

various railways within the county. The police also act in part as inspectors of common lodging-houses, and in relief of tramps." In most or all of these cases the "local authority" is free to employ as inspectors any fit persons, but finds that policemen are the fittest, so the policeman when making an inspection will be acting as appointed inspector and not as constable, a distinction which the inspectees (if we may coin a word) may perhaps think important, perhaps not. In truth, the very large inspectorial powers given by this statute and by that are becoming consolidated in the hands of the police.

CHAPTER XI.

ARREST—MAGISTERIAL EXAMINATION—SUMMARY JURISDICTION.

Now touching the arrest of offenders some distinctions must be taken. The arrest is made with or without a magistrate's warrant; it is made for felony or some other offence; it is made by a private person, or by a constable or other peace officer.[1] An illegal arrest is of course a serious matter; therefore we will first take a statement of the common (non-statutory) law from Mr. Justice Stephen's *History*:—

"1. Any person may arrest any person who is actually committing or has actually committed any felony.

"2. Any person may arrest any person whom he suspects on reasonable grounds to have committed any felony, if a felony has actually been committed.

"3. Any constable may arrest any person whom he suspects on reasonable grounds of having committed any felony, whether in fact any such felony has been committed or not.

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[1] It seems probable that justices, sheriffs, and coroners, have at least some of the special powers of constables, but there is little modern authority on the topic, since it is not now considered one of their regular duties to seek out and arrest offenders.

"The common law did not authorise the arrest of persons guilty or suspected of misdemeanours, except in cases of an actual breach of the peace either by an affray or by violence to an individual. In such cases, the arrest had to be made not so much for the purpose of bringing the offender to justice as in order to preserve the peace, and the right to arrest was accordingly limited to cases in which the person to be arrested was taken in the fact, or immediately after its commission." [1]

The distinction between the power of the private man and that of the constable is so important that a second statement may be welcome: "Under the common law, if a felony were actually committed, a person might be arrested without a warrant by any one, if he were reasonably suspected of having committed the felony; and a constable could go further: if he had reasonable ground for supposing that a felony had been committed, and reasonable ground for supposing that a certain person had committed the supposed felony, he might arrest him, though no felony had actually been committed." [2]

But on this basis of common law an elaborate superstructure has been raised by modern statutes, which have largely extended the power of summary arrest allowed to the private man, and still more largely the power of the constable. Any person may now, without warrant, arrest any person whom he finds committing any crime at night, and may arrest at any time any person whom he finds committing any one of several great classes of crime. One of these classes comprehends the various forms of theft and crimes cognate to theft, another

[1] Stephen, *Hist. Crim. Law*, Vol. I., p. 193.

[2] Mr. Justice Blackburn, *Law Reports, Queen's Bench*, Vol. I., p. 456.

coinage offences, and there are others. Some of these crimes are felonies, some misdemeanours; but the power thus given by statute is not a power to arrest on suspicion or even on certain knowledge that a crime has been committed; it only exists when a person is "found committing" the crime. Again, to constables statutes have given powers of summarily arresting persons found committing any of many other offences some of which are not (in our sense)[1] crimes, especially what are called "street offences." Within the Metropolitan Police District there prevails a special code which denounces small punishments against various petty nuisances committed in the open street, riding on the footway, beating carpets, throwing things out of window, leaving cellar-traps open, and so forth; and a somewhat similar code prevails in every "urban district."[2] Persons who are found committing these street offences a constable can arrest without warrant, if he cannot ascertain their names and residences. Divers acts of cruelty to animals are offences punishable on summary conviction, and a constable may arrest for these without warrant if he sees them, or is informed of them by a person who gives his name and abode. So the man who is drunk and disorderly in a public place may be arrested. Indeed, the catalogue of offences for which a constable may take one into custody *flagrante delicto* is long. Then again (more particularly within the Metropolitan District) constables have certain powers of apprehending those who, in

[1] See above, p. 16.

[2] This includes the municipal boroughs and some other places. See Citizen Series, Chalmers, *Local Government*, p. 109.

certain suspicious circumstances, are apparently about to commit crimes.

The outline of these statutory powers is irregular and not to be briefly defined. A power of immediate arrest is requisite for the punishment of some small offences, and not nearly so requisite in the case of some grave crimes. If a man is "wanted" for bigamy (which is a felony), perjury, bribery, or the like, there is no great need for arresting him without warrant, but there is little chance of punishing street offences unless the offender can be apprehended on the spot.

When no arrest has been made, and it is desired that a person accused of crime shall be committed for trial, then an information must be laid before a justice, who will issue a summons against that person, or a warrant for his apprehension. The information is a statement that he has committed, or is suspected of having committed, the crime, and if, as is most usual, a warrant is to be issued without any previous summons, the information must be in writing and sworn. A summons will contain a brief statement of the accusation, and an order requiring the accused to appear at a given time and place. It must be served upon him personally, or, if he cannot conveniently be met with, left with some person at his last or usual abode. If he fails to appear, a warrant can be issued for his apprehension; but, as already said, the justice having a sworn information before him can, if he thinks fit, issue a warrant in the first instance, and generally does so. The warrant must state the substance of the charge, and must name or describe the person to be arrested, and will order some constable, or other person named in it, or generally the constables of the area over which the magistrate's com-

mission extends, to apprehend the accused. Territorially the magistrate has power to cause his arrest, if either he be resident within that area, or (according to the information) the crime was committed within that area; but if the arrest is to be made elsewhere, then, as a rule, the warrant must be backed[1] by some magistrate commissioned for the place where the arrest is to be made. The apprehending constable must have with him the warrant, and show it if required. Unless there is some grave and apparent irregularity the constable must obey the warrant, and in so doing will have the law on his side.

A police constable enjoys some special protection; for assaulting him when in the execution of his duty one may be punished summarily by a £20 fine or six months imprisonment, which is a severer sentence than can be passed after a summary conviction for a common assault on a private man; while to assault any person with intent to resist lawful apprehension is a serious indictable crime. But the law expects of bystanders more than benevolent neutrality; it expects them to assist a constable who in making an arrest calls for their aid, and it will punish them if they refuse assistance.

Thus far as to the means for compelling the appearance of one who is charged with a crime. If it is desired to bring before a Court of Summary Jurisdiction one who has been guilty of a minor offence and who is not in custody, the process is much the same. An information is laid before a magistrate whose commission extends over the place where the deed was done, and he, unless the charge seems groundless, issues a summons, or, if he thinks fit and the information is

[1] See above, p. 8.

verified by oath, a warrant. In most cases only a summons is issued in the first instance, and if this fails a warrant is granted.

The object of an arrest should, in all cases, be merely to bring the person apprehended before a magistrate as soon as may be, and any unnecessary delay or use of excessive force will be dangerous to the person guilty of it. In case of an arrest without warrant for one of the minor offences, if it will not be practicable to bring the arrested person before a Court of Summary Jurisdiction within twenty-four hours, a superintendent or inspector of police, or other officer in charge of a police station, must inquire into the case and, unless the offence seems serious, discharge the accused on his giving reasonable security for his appearance in court.

It has been convenient thus far to make little distinction between crimes and offences which can be summarily punished, but the purpose for which an accused person is compelled to appear is not the same in both cases. If charged with a crime that cannot be summarily punished, the object is that a justice shall make but a preliminary examination of the case, and if there seems good ground for further proceedings, commit the accused to prison or take bail for his appearance, so that in one way or the other he will be forthcoming for trial at a future day; if charged with a minor offence, then the object is that he shall at once be tried by a Court of Summary Jurisdiction. But in some instances, when the accused comes before the magistrate it cannot be known whether there will be a summary conviction or a commitment for trial. In certain circumstances justices of the peace can now deal

finally with certain indictable crimes. This is yet new, the result of changes in the law made in our own day. If a "child"—that is, a person who seems to be under the age of twelve—is charged with any crime save homicide, the court may, with the consent of the parent or guardian, try the case summarily instead of sending it for trial by jury, but can impose no longer imprisonment than a month's, no heavier fine than forty shillings. If a "young person"—that is, one apparently between the ages of twelve and sixteen—is charged with certain crimes which may generically be called thefts,[1] the court may, with his consent, proceed to try him summarily, and the maximum punishment is here three months' imprisonment with hard labour, or a £10 fine. If an "adult" is charged with theft to an amount not exceeding forty shillings, he may, with his consent, be summarily tried; while, if he pleads guilty to theft, no matter how much be stolen, the court may, if it thinks fit, sentence him, but six months hard labour is the heaviest punishment at its command. A serious case of theft would not thus be adequately punished, and would be sent for trial to Quarter Sessions. So, on the other hand, there are a considerable number of offences for which a Court of Summary Jurisdiction has been empowered to award imprisonment for more than three months, and these were not indictable offences, but new power has been given to the accused to make them indictable if he pleases. If charged with such an offence the magistrate will, at the outset, ask him whether he will take a summary trial, and if he refuses,

[1] This is meant to include embezzlements, receipt of stolen goods, attempts to steal.

then, after preliminary examination, he can be committed to take his trial before a jury.[1] In all these cases magistrates are required to explain the nature of the choice which the law has given to the accused. If there is to be a summary trial, then, save for very petty cases, there must be a Petty Sessional Court,[2] and the indictable offences can only be summarily tried on a day appointed for the purpose of which public notice has been given.

We can now take our last glance at summary penal justice, and then turn to the more elaborate criminal procedure.

The province of this summary justice is indeed variegated, as may be guessed when we say that of the eighty-two departments into which for statistical purposes it is divided, the largest is "drunkenness, and drunk and disorderly" (with 193,000 cases a year), while next comes "offences against the Elementary Education Acts" (97,000); then "common assault" (67,000), then "offences against local acts and borough bye-laws" (47,000), then "simple larceny" (38,000).[3] At the one end of the scale there are what would commonly be called the smaller crimes, assaults, thefts, malicious injuries to property; at the other the mere disobediences to statutory rules framed to secure some public good, such as health, education, the well-being of factory children, a revenue from excise and customs, or the like; and between these poles there lie the breaches of good order

[1] But this does not apply to assaults; for these one may sometimes get more than three months' imprisonment without the choice of trial by jury.

[2] See above, p. 89.

[3] *Judicial Statistics*, 1883; these are the round numbers.

such as disorderly drunkenness and vagabondage in its various forms, the "street offences," the pettier kinds of dishonesty—adulteration, the use of false weights, cruelty to animals, some electoral malpractices, and many other particulars not to be classified. The whole is the outcome of statute; legislation has been minute, and the offender must be brought within the very words of some particular clause, for the Common Law knows nothing of this summary jurisdiction. Rather more than 725,000 cases are yearly determined: it would be prudent to bet four to one, imprudent to bet five to one on a conviction. More than 400,000 fines are inflicted, and more than 80,000 imprisonments, about half of which do not endure for more than fourteen days, very few for more than three months, and about one in 1,000 for more than six months. In a few of the worst cases the court can pass no sentence but one of imprisonment, with or without hard labour; in many cases it has a choice between fine and imprisonment; in many others it can in the first instance only impose a fine. As a general rule the statutes only fix a maximum punishment, and a liberal power of awarding less is left to the court. The maximum fine or money penalty varies greatly from case to case, from the five shillings for the breach of a school board bye-law, to the ten shillings for being found drunk in the highway, and the favourite forty shillings up to the heavy penalties by which revenue law protects itself. Then again, if the penalty be not at once paid the court can in some cases at once commit the delinquent to prison for a certain time, but the imprisonment will come to an end when the fine and costs are paid; in other cases the first process for obtaining payment will be a distress, that is, a seizure and sale

of goods, and if goods enough cannot be found then there will be imprisonment. The moneys thus raised go sometimes to the Crown, sometimes to the police superannuation fund, occasionally to the person who has suffered harm, generally to the treasury of the county to which the Court of Summary Jurisdiction belongs. The court can order a convicted defendant to pay the prosecutor his reasonable costs, and can make a similar order against the prosecutor and for the defendant if the charge be dismissed.

Between the crimes and the minor offences there is this great difference. According to our law a man may be indicted no matter how long a time has passed since the supposed crime was committed; there are some exceptions to the rule, but they are few; on the other hand, Parliament in creating offences which are to be summarily tried has generally fixed some time longer or shorter within which proceedings must be begun, and now we have this general rule that if no other period be fixed then no information can be laid but within six months after the offence was committed.

In these cases the procedure is called "summary," but we must not be misled by the word. There is a full trial in open court conducted according to the general principles of English justice. There is a process for compelling the attendance of witnesses on behalf of either party, for arresting such witnesses if need be, for committing them to prison if they refuse to testify. Either party may conduct his own case or be heard by his solicitor or counsel. The elaborate rules of evidence in force in the higher courts are in force here also; the witnesses are sworn, examined, cross-examined, and will commit perjury if they swear to a lie. In general the

defendant can give no evidence, but exceptions to this rule are on the increase and very likely will spread from the sphere of minor offences to that of crimes. There is power to convict a person who, having been duly summoned, does not appear; but this is sparingly exercised, it is deemed better to order his arrest, and if he cannot be arrested then there is little use in convicting him. In case he is sentenced to imprisonment without option of a fine, and in many other cases also, he can appeal to Quarter Sessions, and the whole matter, fact and law, may be reopened; or again, any person aggrieved may bring a question of law before the High Court where it will be heard by at least two judges; this is done by requiring the justices to "state a special case," *i.e.* to set out the facts as found by them; if they decline (as they may if they think the appeal frivolous), then he can apply to the High Court for an order directing them to state the case.[1]

How vital a part of the English system the summary determination of cases that are truly criminal has become may best be shown by figures. In 1883, about 14,000 persons were tried for crime before a jury, while the number of summary convictions for the one offence of simple larceny was above 27,000; the number of persons convicted by juries did not amount to 12,000, while more than 19,000 sentences of imprisonment for a longer period than a month were passed by magistrates without any

[1] In 1883 there were but 157 appeals to Quarter Sessions (40 of these from bastardy orders), and some 40 special cases were argued in the High Court. The case is heard by "a divisional court." If the proceedings are "criminal proceedings" within the largest sense of that phrase (and such they generally are) there is no further appeal to the Court of Appeal.

trial by jury. No apology, therefore, should be expected of us for having devoted much of our small space to the summary jurisdiction: we have been turning towards the rising sun.

And now suppose that a person accused of a crime is brought before the magistrate, and that a summary trial is out of the question. The object of the examination which takes place is to see whether there is such evidence against him as raises "a strong or probable presumption" of his guilt; if, in the magistrate's opinion there is not, then he will be discharged from custody, otherwise he will be committed or bailed for trial. This preliminary examination of accused persons has gradually assumed a very judicial form; it is in effect a preliminary trial. The place in which it is held is indeed no "open court," the public can be excluded if the magistrate thinks that the ends of justice will thus be best answered; but any use of this power of exclusion is uncommon. There is compulsory process for securing the attendance of witnesses both for and against the accused. A witness gives his evidence on oath and is liable to cross-examination, for which purpose solicitors and counsel are often employed. The evidence for the prosecution is first given, and then the magistrate—unless he at once dismisses the charge—addresses the accused in some such words as these: "Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so; but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial." After this ("the usual caution" of our police reports), the accused can make his statement and call witnesses to

prove his innocence, and then it will be for the magistrate to say whether the case is to be dismissed or sent for trial.

If not discharged the accused will be committed to prison or bailed so that he may stand his trial at Quarter Sessions, Assizes, or Central Criminal Court, in case an indictment is there found against him. When a person is said to be *bailed* this means that he and some surety or sureties have *entered into a recognizance*, have been *bound over*, for his appearance at the trial. When a person enters into a recognizance he acknowledges that he will owe the Queen a specified sum in case something be done or not done. A man may thus be bound over to keep the peace, to be of good behaviour, to be forthcoming at a trial, or the like. Thus, if he be bailed for trial and does not appear, there will be a stringent process for enforcing the debt that has become due to the Crown against him and his sureties, the persons who are *his bail*, who have *given bail* or *gone bail* for him.[1] The question, "gaol or bail?" is generally for the magistrate's discretion. In case of treason he cannot allow bail without an order from a Secretary of State or the High Court. In case of felony, or any one of many misdemeanours specified by statute, he can allow bail if he thinks fit. In case of the unspecified

[1] The word has been twisted. To start with, *to bail* means to commit a thing to a person, to entrust a person with a thing. In the language of our law, if A lends B a chattel, or deposits a chattel with B for safe custody or the like, A *bails* the thing to B. A is the *bailor*, B the *bailee*, there is a *bailment*. So, in strictness, it is the magistrate who bails the accused to his sureties for safe custody, and if the sureties fear that the accused will not be forthcoming, they can arrest him and deliver him to prison

misdemeanours he must allow bail. Among the specified misdemeanours are perjury, obtaining by false pretences, riot, assault on a peace officer. Libel is an example of the offences for which bail must be allowed. It is for the magistrate, however, to decide on the amount of the bail to be demanded, and the sufficiency of any proposed surety; but the Bill of Rights vaguely prohibits a demand for "excessive" bail. The taking of bail, as will be seen below, is becoming uncommon; railways and steamships and large towns are making it imprudent. While the examination is proceeding the magistrate has a similar discretion to exercise, for he can from time to time remand the accused for further examination and order that he be detained in custody during the interval, or suffer him to be at large having entered into a recognizance with or without sureties for his further appearance; but the interval may not exceed eight days. One who thinks himself unlawfully imprisoned can question the legality of his detention by means of the writ called *habeas corpus*.

The *habeas corpus* belongs to the class of prerogative writs whereby, from an early time, the King's Court exercised its supreme control over all the justice of the realm. He who as sheriff, gaoler, or otherwise, was detaining another in prison might by the writ be commanded to have the body of that other before the King's Court to undergo and receive whatever that court should award in his behalf. It became a summary remedy for those unlawfully imprisoned, and in course of time a protection for the subject against an illegal detention even under the special command of the King himself. That despite such command the writ should be granted,

that such command should be no sufficient answer to the writ, that the writ should issue promptly and be punctually obeyed, these were the objects of famous struggles in the seventeenth century. Nowadays, there is not much reason to fear that any one will be imprisoned in a purely arbitrary way, but an application for this writ is still the ready mode for bringing before the High Court the question whether or no an imprisonment is lawful.

The great purpose that is served by the magisterial examination in criminal cases may be best seen from figures. During 1883 the number of persons arrested for crime and not summarily tried was 20,450. Of these 5,192 were discharged by the magistrates; 13,745 were committed to prison for trial; only 1,331 were bailed for trial; 39 were committed to prison for want of sureties; 143 were on bail for further examination when the statistics were made up. Much, then, is done by this preliminary investigation towards filtering innocence from guilt. If a man is sent to trial by a magistrate it is highly probable that he will be convicted.

The magisterial examination serves other purposes also. The evidence given by the witnesses is taken down in writing, and these "depositions" are signed by the witnesses and by the magistrate. Use can thereafter be made of them in divers ways, both by the prosecuting party and by the accused, who is entitled to have a copy of them.

"The perpetuation of testimony is, no doubt, one of the various great incidental advantages arising from the provisions of the statutes relating to the duties of justices in these matters. In the first place, those who have to frame the indictment have the

advantage of seeing the whole of the evidence on the depositions, and of being able to adapt the indictment to it. The judge also is enabled to make himself acquainted with the facts before the trial. Again, if there is any discrepancy between the deposition of a witness and his statement at the trial, this may afford substantial grounds for shaking his evidence. Lastly, if a witness dies, or is too ill to attend, his testimony is perpetuated." [1]

But it should be understood that only in quite rare cases can these depositions be read as evidence at the trial; this can be done when it has first been proved that the deponent is dead or too ill to travel, or is being kept out of the way by the other side; but a deponent who is called as a witness may be confronted with his previous testimony in case he contradicts it. One of the objects of the preliminary examination is to compel those who are able to give testimony for or against the accused to appear as witnesses at the trial; and this is done by "binding them over" to give evidence, that is, compelling them to enter into recognizances, so that if they are not forthcoming they will be debtors to the Crown.

There is one other form of preliminary investigation, namely, the coroner's inquest, but of this much has been said in another book of this series that we need not repeat,[2] and the matter is hardly of first importance. It is the duty of a coroner to hold an inquest if he has reason to believe that any person has come to his death by any foul play, or that he has died suddenly from

[1] From a judgment of Chief-Justice Cockburn, *Law Reports, Queen's Bench Division*, Vol. V., p. 7.

[2] Chalmers, *Local Government*, pp. 95–98, and for the borough coroner, see pp. 80, 81.

some unknown cause, or if he has died in prison; and there are special provisions for bringing to the coroner's notice deaths in lunatic asylums and baby-farms. The inquest is held with a jury, which must consist of twelve or more—twelve must agree before there can be a verdict, but, subject to this rule, the opinion of the majority prevails. The coroner has power to compel the attendance of witnesses; evidence is given upon oath. It is usual to allow counsel or solicitors representing the family of the dead man, or any person who is under suspicion, to cross-examine the witnesses and address the jury. When there is a verdict of murder or of manslaughter, the coroner can bind over the witnesses to give evidence at the trial, and he will send their depositions to the court before which the trial will take place. The inquest may be useful for other purposes, but the main legal power that it has is that of finding a verdict of murder or manslaughter against some person. Then the coroner ought to issue a warrant for that person's apprehension and commit him to prison; in case of manslaughter he can take bail. This verdict is equivalent to an indictment, and the accused can be put on his trial before a petty jury without any proceedings before a grand jury. As a matter of fact, however, this is seldom, if ever, done. In general a murderer, before he comes to the gallows, will have against him (1) the decision of a magistrate that there is probable cause for putting him on his trial; (2) the verdict of a coroner's jury; (3) a bill of indictment found by a grand jury; (4) the verdict of a petty jury: but it should be understood that either the second and fourth, or the third and fourth of these are all that is essential. The investigation before a magistrate is

not essential, and a man may well be hanged though there has been no coroner's inquest.[1]

[1] As to official inquiries into the causes of railway accidents, explosions, &c., see Citizen Series, Farrer, *The State and Trade*, p. 156. Possibly such inquiries will in time supersede the coroner's inquest, but they have no legal result; they merely obtain information which may, or may not, lead to a prosecution; witnesses however can be compelled to attend and give evidence on oath.

CHAPTER XII.

PROSECUTION.

The arrest of the person suspected of crime, his examination before a magistrate, his commitment to prison or release on bail, though usual, are not necessary steps in our criminal procedure. A prosecution may begin with *an indictment*, or with *a criminal information*, or, in case of murder or manslaughter, with *a coroner's inquisition;* unless and until there is one of these a man cannot be put upon his trial before a petty jury. Of the coroner's inquisition enough has been said, and the criminal information shall be noticed hereafter;[1] so we turn to the indictment, which is by far the most common means of bringing a criminal to trial by jury. It has an ancient origin. From the twelfth century onwards the King's judges were sent through the country to inquire, by the oath of good and lawful men of the neighbourhood, concerning crimes committed within that neighbourhood. The representatives of the neighbourhood became, in course of time, what we know as the grand jury, and their sworn accusations were known as presentments or indictments. The grand jurors were accusers who pledged their oaths to the truth of their accusation, and to this day an indictment

[1] See below, p. 143.

is in form an accusation made by the grand jurors. "The jurors for our lady the Queen upon their oaths say" that (to curtail the story), on such a day and at such a place, John feloniously and of his malice aforethought did kill and murder Peter, against the peace of our said lady the Queen, her crown and dignity. The grand jurors still have it in their power to indict a man, although no one else has made, or is making, any charge against him; but, as a matter of fact, this is not now done. Some one prefers a bill of indictment to the grand jurors—a document stating, *e.g.* that John has murdered Peter—and the grand jurors, after hearing in private evidence for the prosecution but not for the defence, endorse the bill with the words "a true bill," if they think that there is a case which should go to trial, or with "no true bill," if the charge seems groundless. In the former case the accused, if in custody, will be discharged; but he is not acquitted: another indictment for the same crime may be preferred against him. In the latter case he will be "arraigned" —called upon to answer the accusation. The grand jury must consist of not less than twelve or more than twenty-three men. Of the qualification of grand jurors we shall speak below.[1] There can be no indictment unless twelve at least concur.

As already said, the first notice that a man may have of a criminal charge made against him may be notice that the indictment has been found, and, being indicted, a warrant for his arrest can at once be obtained and he can be brought to trial. Also it is to be remembered that "any person may present a bill to any grand jury accusing any other person whatever of any crime what-

[1] See below, p. 165.

ever."[1] To this liberty of secret accusation some bounds were first set in 1859. There are certain crimes for which one cannot now be indicted unless the consent of the Attorney- or Solicitor-General or a judge has been obtained, or unless one has been committed by a magistrate or bailed to answer an indictment, or unless the bill has been preferred by a person who has been bound over to prosecute. Any one however may insist on being so bound over, though the magistrate thinks the charge groundless; but in such case, should the accused be acquitted, he will be entitled (a man wrongly indicted is, in general, not entitled) to recover his costs from his accuser. The list of crimes in question is not long; it comprises such as were supposed to be often the subject of vexatious indictments—perjury, conspiracy, libel, obtaining by false pretences, and a few others; it might well be made longer. But though it is still the general rule that a person may first hear that he has been charged with a crime after he has been indicted, still such cases are now comparatively rare. In the usual course he is examined by a magistrate and committed, or bailed, for trial. The witnesses are bound over to appear at the trial, and some one is bound over to prosecute—sometimes the person who has been injured, sometimes a policeman, sometimes the magistrate's clerk. There is a considerable diversity of practice in different parts of the country, and in some towns one and the same person—a solicitor—is bound over to prosecute in every case.[2] The magistrate's clerk then forwards the depo-

[1] Stephen, *Digest of Criminal Procedure*, art. 191.

[2] I believe that Liverpool set this fashion. It has been followed with variations at Birmingham, Bolton, Leeds, Manchester, Newcastle, and some other places.

sitions to the court in which the trial is to take place: if it is to be at Quarter Sessions, they go to the Clerk of the Peace for the county or borough; if at the Assizes, then to the Clerk of Assize.[1] From these depositions he frames a bill of indictment, unless the prosecutor chooses to employ his own solicitor for this purpose. Then, at the opening of the Assizes or Sessions, the judge, recorder, or chairman, having the depositions before him, charges the grand jury, that is, explains to them any matters of law concerning the various cases which seem to need explanation. The grand jurors retire to consider the bills, and in secret they hear the evidence for the prosecution, sometimes permitting the presence of the prosecutor's solicitor. Their inquiry is quite independent of that which has taken place before the magistrate. The grand jury system saves a certain number of innocent persons from the shame and annoyance of public trial, and seems necessary so long as proceedings before a magistrate are not made essential in all cases; but such proceedings are now so usual that for a grand jury to ignore a bill has become a rather rare event.[2]

When a true bill is found then there will be a trial, unless indeed the person indicted is not in custody and cannot be apprehended. If he cannot be found, then, theoretically, he can be outlawed. An outlawry would

[1] There is a Clerk of Assize for each circuit; he is appointed by the senior of the judges on the circuit when a vacancy occurs, is paid a salary voted by Parliament, holds office during good behaviour. His main functions are to prepare indictments and tax costs.

[2] In 1883, "no true bill" was found in 530 cases, while more than 14,000 went to trial.

be a tedious process conducted by the sheriff; the outlaw, in case of felony or treason, would be in the same position as if he had been tried and convicted, and even in case of misdemeanour his goods would be forfeit. But no use is now made of this ancient process. We have extradition treaties with many foreign states, and a fugitive offender seldom leaves behind him property that is worth taking. But there being an indictment and a prisoner, the trial will go forward. If there is some private prosecutor interested in the event, then he very likely will have put the matter into the hands of a solicitor who will have got up the case, secured the attendance of witnesses, and retained some barrister to conduct the proceedings in court. When this does not happen, the custom at some Sessions is to allot the prosecutions to the barristers who attend those Sessions in rotation, copies of the depositions taken before the magistrate serving as their instructions. If there is no advocate for the prosecution, then the judge or chairman has to examine the witnesses. If no witnesses are forthcoming, then the accused is acquitted, otherwise the trial will proceed as mentioned below.[1] It is a trial, not between two private litigants, but between our lady the Queen of the one part, and the accused of the other part. When once the indictment is found, the so-called prosecutor cannot, while, on the other hand, the Queen's Attorney-General can, stay further proceedings. This he can do by "entering a *nolle prosequi*," which will bring to an end all proceedings upon the indictment in question, though it will leave the accused open to be indicted again for the same offence. This power is

[1] P. 164.

sparingly used to prevent prosecutions that are obviously vexatious.

But for all this our law has left the prosecution of criminals very much in the hands of the public.[1] Undoubtedly that law is now in a state of transition, and prosecutions are coming more and more under official control; but before the present condition of affairs can be described we must refer to an important cause of change. The expense of prosecutions has gradually been thrown upon the public. Formerly he who took upon himself to bring a criminal to justice did so at his own cost. By slow degrees this has been altered. A statute of 1752 began the practice of throwing the costs of prosecuting felons upon the county. At present the costs of a prosecution for felony, or for any one of the common misdemeanours, can be allowed by the court which tries the case, whether the prosecution be or be not successful, and the costs of witnesses for the defence can be similarly allowed. When costs are to be thus allowed they are taxed (*i.e.*, the amount is fixed) by an officer of the court, and the amount so fixed can be obtained from the county treasury. Until 1836 these costs were a local burden, and they still fall on the county in the first instance, but since that year one half, and since 1846 the whole, of these costs has been repaid to the counties by the nation. There is no statute which directs this payment, but a vote for the requisite sum is taken each year and sanctioned by the annual Appro-

[1] To speak of the English system as one of *private* prosecutions is misleading. It is we who have *public* prosecutions, for any one of the public may prosecute; abroad they have *state* prosecutions or *official* prosecutions.

priation Act.[1] The assumption by the nation of this burden has necessitated an arrangement, by which the amount of costs to be allowed is brought under the control of the Home Office, and has helped to change our view of the duties of the state as regards the prosecution of crime.[2]

Of course the executive government, the King and his Ministers, has, on occasion, itself put the criminal law in motion, more especially for the punishment of treasonable offences; and though a state trial in its legal incidents has differed but little from a trial for petty larceny, still the King has had officers charged with the duty of bringing to justice the greatest offenders and endowed for that purpose with some special powers.

The Queen's Attorney and Solicitor-General "the law officers of the Crown" are, we may say, the two most distinguished lawyers whose services the Ministry of the day has been able to secure. Theoretically they hold office during the Queen's pleasure, practically their tenure is the ministerial tenure;[3] they are not according to usage members of the Cabinet, but they share its parliamentary fortunes. It is desirable and expected that they shall be members of the House of Commons, and answer to that House for their doings. They are paid for their public duties partly by salaries, partly by fees; their office does not prevent their being retained as advocates by private litigants. In practice it falls to

[1] As to the Appropriation Act, see Traill, *Central Government*, p. 46.

[2] In 1882, about £120,000 was paid by the Treasury for prosecutions at Assizes, Sessions, and Central Criminal Court, and about £24,000 for summary penal proceedings. These figures do not include the cost of the prosecutions instituted by the Treasury itself, of which, see below.

[3] As to which, see Traill, *Central Government*, pp. 26-30.

them to support the ministerial case in the House of Commons when legal questions are raised, and one or both of them will generally take charge of such government bills as concern legal procedure. Again, when any difficult questions of law arise in any of the great departments of state, cases are submitted to the law officers for their opinions. They are the legal advisers of the executive government.

Apart from these constitutional duties the Attorney-General has certain special powers and functions, most, if not all, of which might, were his place vacant, be exercised by the Solicitor-General. To begin with criminal matters: the Attorney-General can accuse a person of, and place him on his trial for, any misdemeanour (but not any treason or felony) without indictment or any proceedings before a grand jury. This he does by "filing a criminal information"; he informs the High Court that such an one has committed such a crime; this accusation serves in place of an indictment, and there follows a trial with a petty jury. In the past this procedure has been used for the punishment of seditious libels and the like, but it has become very uncommon, and even those whose crimes may be called political are now indicted in the usual way, the Attorney-General conducting the proceedings in court. These informations ("*ex officio* informations") by the Attorney-General must be distinguished from the criminal informations filed by the Master of the Crown Office (one of the Masters of the Supreme Court),[1] on the complaint of some private person. It is in the power of the High Court on such a complaint to order that an information for a misdemeanour shall be filed by this

[1] See above, p. 49.

master, and when this is done the accused can be brought to trial by a petty jury, much as though an indictment had been found against him. But the court only allows this in very few cases, *e.g.*, when some officer of state has been libelled and is desirous of at once contradicting the charge, or when some magistrate is accused of very grave misconduct in his office. Both parties are heard by the court before an order is made for filing the information, and practically a decision of the court that there is good ground for an information here takes the place of the finding of a true bill by a grand jury. But this procedure is quite exceptional.[1]

Then again the Attorney-General, as already said,[2] can stop a criminal prosecution by his *nolle prosequi*. Also he can grant or refuse his *fiat* for a writ of error, which writ, as will be seen below,[3] is the means whereby judgment in a criminal case can be reversed. It is said to be his duty to give his fiat if there is reasonable cause for the application, but there is no legal process for compelling him to do so. Sometimes again a statute imposes a money penalty for an offence (*e.g.*, that of sitting in the House of Commons without having taken the prescribed oath) and gives the penalty to the Crown; the Attorney-General institutes proceedings for the recovery of such penalties. He also represents the Crown in many forms of litigation which are not penal. Proceedings by him (exchequer informations) are the means whereby debts due to the Crown, on account of the imperial taxes or otherwise, can be recovered in the

[1] Seemingly in 1883 no criminal information was filed either by the Attorney-General or the Master of the Crown Office. *Jud Stat.* 1883, Pt. II., p. 6.

[2] See above, p. 140.

[3] P. 171.

High Court. In such cases he is set in motion by the department of state concerned to receive the money, the Treasury it may be, or the Inland Revenue. And there are other cases in which he represents the Queen in the protection of public, rather than royal or governmental, interests. Thus, proceedings to prevent or remove by the injunction of the High Court nuisances which are nuisances to the public at large are brought by him, and he must in general be a party to any litigation touching the application of property devoted to charitable purposes; but in these cases he somewhat readily permits the use of his name by any private person who has reasonable cause for interference, retaining, however, a control over the action which can be exercised if necessary. There are other instances of less moment. Nor is he always the active party in litigation, for it sometimes falls on him to defend the Crown against claims. No action, indeed, can be brought against the Queen, but proceedings can be taken which are very like an action. A "petition of right" by the person who thinks himself wronged is presented through the Home Office to the Queen, who declares it her pleasure that right shall be done; and then there is what in truth is a lawsuit between this petitioner as plaintiff, and the Queen, represented by her Attorney, as defendant. Complaints of anything done by the Queen herself we need not imagine, but by this procedure, for example, damages can be obtained for breach of a contract made on her behalf by the head of some department who has power to contract in her name.

The law officers have not been, and are not, at the head of any permanent public department. There was not until lately, and even yet there hardly is, any one

department charged with a general duty of enforcing, by legal proceedings, the claims of the Crown or of the executive. But such a department has been slowly coming into existence, that of the Solicitor to the Treasury. The legal work of the various great central offices has gradually been consolidated in one bureau, presided over by an officer who, though called a solicitor, has in fact been a barrister of high standing, a member of the civil service who does not "go in and out with the Ministry." The work done by him, and by his small staff of assistant solicitors and clerks, is most miscellaneous; perhaps we give the best idea of it by saying that he does for these offices, the Treasury, the offices of the Secretaries of State, and some others, the business that is done for a private man by his family solicitor. His department has gradually been devouring other institutions. He is now, for example, Queen's Proctor, and charged as such with the duty of intervening in divorce cases if there is reason to suspect that the parties are colluding with each other, or keeping back evidence from the court. He also looks after the rights of the Crown when a person dies intestate and without kin, and is constituted that person's legal representative; and he performs the solicitor's part in a great deal of litigation between the Queen (*i.e.*, the executive government) and her subjects, the law officers acting as advocates and advising counsel.

A great deal of criminal business came gradually into his office. In 1855 he could still say that such business was almost the least important part of his work. But such business there was. In the cases, once commoner than they are now, in which the Attorney-General instituted a prosecution for a political crime, the Treasury

Solicitor had acted as the solicitor for the prosecution, investigated the facts, arranged the evidence, and so forth. Then again, the prosecution of coinage offences had been in the hands of a public officer, the Solicitor to the Mint, and when his place was abolished this work came to the Treasury Solicitor. Then he was sometimes directed to institute a prosecution for a crime directly touching one of the great departments. But it was the formation of the Metropolitan Police that brought him into contact with common offences. It became the practice of the police magistrates to bind over policemen to prosecute when there was no private prosecutor ready. The policemen in cases of difficulty applied through the Metropolitan Commissioner for legal assistance. For a while this was given by a Home Office Solicitor, but afterwards, his place being abolished, by the Treasury Solicitor. In cases of murder, manslaughter, and violent assaults on the police, the Home Secretary would direct him to see to the prosecution. Such cases were quite few; in 1855 it was said that there were about forty a year. Then the Home Secretary began on rare occasions to direct a prosecution in country cases. The crimes of fraudulent bankrupts (crimes for which those who suffer by them are often unwilling to prosecute) found new work for the Treasury Solicitor. In 1879 the number of prosecutions conducted by him had risen to 459, but 210 of these were Mint cases, and 79 bankruptcy cases. An assistant of his, or a country solicitor employed by him for the occasion, would attend the magisterial examination, prepare the evidence for trial, and instruct counsel. At the Central Criminal Court the same barristers were always engaged for the prosecutions thus directed by the Home Office. In this as in

other instances the vast "metropolis" has been the determining cause of great changes.

Meanwhile the whole theory of public prosecutions had been abundantly discussed. Englishmen began to see that they had against them the practice of almost all other countries. In Scotland, for instance, there are public officers throughout the country, procurators fiscal, whose duty it is to investigate criminal cases and prepare them for trial under the control of the Lord Advocate, and a prosecution instituted by a private man though theoretically permissible is practically unknown. Even in Ireland there has been developed out of English law, and apparently without legislation, a system of Crown Solicitors and Crown Counsel controlled by the Irish Attorney-General which has very largely superseded prosecution by private persons. During a quarter of a century commissions and committees reported on the subject, and several ambitious schemes were laid before Parliament, applauded, and forgotten. The main complaints against our procedure were, that prosecutions were compounded, that prosecutions were instituted for vexatious purposes, that, when there was no private prosecutor with means, cases came to trial in an unprepared state. It became a mark of enlightenment to demand the immediate creation of a complete system of public prosecutors; but beyond this demand there was extremely little agreement. To say nothing of details, it has been very generally believed that to put the control of the criminal law into the hands of state officials is not the way to make that law respected. It is better that some rogues should go quit, and some guiltless men be vexed by false charges, than that there should be any room for even a groundless suspicion that party

politics have or can have anything to do with criminal law. This has been felt and has hitherto delayed what perhaps is the fated progress of events.

At last, in 1879, after five-and-twenty years' discussion, a measure, which proved to be a very small measure, was passed. A Director of Public Prosecutions was to be appointed by the Home Secretary, he was to be an experienced lawyer, paid by salary. He was (1) to give advice to private prosecutors, justices, magistrates' clerks, policemen, and the like; and (2) himself to institute criminal proceedings according to rules to be made by the Attorney-General with the approval of the Chancellor and Home Secretary. In 1883 his office was abolished, or rather it was enacted that the Treasury Solicitor should for the future be also Director of Public Prosecutions. Practically the functions exercised by the Director had been very much those which theretofore had been exercised by the Home Office, that is, he had directed the Treasury Solicitor to prosecute in cases of the same sort as those in which such direction had formerly been given by the Home Secretary. The existence of a separate department for this purpose seemed unnecessary. For the future then the Treasury Solicitor, subject to such regulations as just mentioned, is to take up the prosecution if he thinks fit without the need of any orders. The chief and head constables are to bring to his notice crimes committed within their districts. He and his staff will personally see to London cases, but it seems to be intended that country cases shall be managed by agents, local solicitors, employed for the occasion and paid by the piece. The choice of counsel to conduct these prosecutions is seemingly left to the Attorney-General. There is (in theory) to be

no interference with the right of any person to institute, undertake, or carry on any criminal proceeding. In what kind of cases the Treasury Solicitor shall interfere is left pretty much a question to be decided from time to time by the Attorney-General, Lord Chancellor, and Home Secretary, but seemingly it is not at present proposed that his operations shall be extended far beyond their former limits; that is to say, he will take up cases of difficulty, cases in which there is reason to fear a failure of justice. Until this year such cases have been very rare, some five or six hundred annually out of some fourteen thousand prosecutions, and of these five or six hundred about one half have been coinage cases. We have not yet made any large inroad on that system of non-governmental prosecutions of which foreigners can see the merits if we can not, and it must be added that the Treasury Solicitor in his prosecutions has hardly any legal powers of any kind that are not possessed by any other prosecutor or his solicitor.[1]

Already it has been made the Director's duty to take up every case in which a Bankruptcy Court orders the prosecution of any offence arising out of, or connected with, bankruptcy proceedings, and he is specially charged to institute prosecutions for corrupt or illegal electoral practices. "No criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper, for any

[1] The history of projects of public prosecutions, and of the Treasury Solicitor can be traced in *Select Committee on Public Prosecutors*, Parl. Papers, 1854–5, Vol. XII., p. 1; 1856, Vol. VII., p. 347; *Fifth Report of Judicature Commission*, Parl. Papers, 1874, Vol. XXIV., p. 319; *Committee on Office of Public Prosecutor*, Parl. Papers, 1884, C. 4016. See also *Self-Government*, § 76; Stephen, *History*, Vol. I., p. 493.

libel published therein, without the written fiat or allowance of the Director of Public Prosecutions, or Her Majesty's Attorney-General in Ireland, being first had and obtained";[1] this is a rare, it is believed unique, example of a kind of legislation that may become common.

[1] Statute, 1881, ch 60, sec. 3.

CHAPTER XIII.

THE CRIMINAL COURTS.

THE courts which receive indictments and try the indicted are, (1) the county and borough Quarter Sessions, and (2) the High Court. This (if we neglect the right of a peer to be tried by his peers) seems to be a correct statement, but it needs explanation, and we should be better conforming to common usage were we to say that the trial, if it does not take place at Quarter Sessions (of which enough has been said[1]), will take place before (*a*) the Queen's Bench Division of the High Court, (*b*) a court constituted by Commission of Assize, of Oyer and Terminer, or of Gaol Delivery, or (*c*) the Central Criminal Court. To clear up this matter, reference must needs be made to a long history, hardly to be told both accurately and very briefly, but unfortunately the statute book requires us to make the effort.

For what are the Assizes? To start with, an assize (*assisa*) means a session, a sitting, for instance, of the king with his councillors, and if at such a session an ordinance is made, that ordinance also will be called an assize; thus an ordinance made at Clarendon is the Assize of Clarendon. Henry II. made many famous

[1] See above, p. 85.

assizes, and among others some which introduced a new procedure for settling disputes about the possession of lands. Lawsuits in which this procedure was used got the name assizes. To determine them, recourse was had to the oath of a body of neighbours, and this body also was called an assize; for the word *assize* had to do hard work. The assize in this last sense was not quite the same thing as a jury; it was an early form of that which came to be a jury. Royal commissioners were sent through the country to determine these lawsuits, or, as the phrase went, to take the assizes; such commissioners were Justices of Assize. Such lawsuits were possible until the 1st June, 1835. Since that day it has been impossible for any one to bring an assize against another, and long before that day the assize had really been supplanted by more modern forms of litigation. So, when the Queen commissioned some one to take assizes, she apparently commissioned him to do what could not be done.[1]

But back in the thirteenth century a statute gave to justices so commissioned a power which grew, while that which came to them in the words of their commission declined. The King's Courts of Common Law had become localised at Westminster, and trial by jury had become a common mode of trial. When an action in one of these courts was ready for trial, then it had been the practice to summon to Westminster a jury from the county to which that action belonged—a Cornish jury for a Cornish action; jurors from no other county would know the facts, and it was necessary that they should know the facts, for the jurors of those days were the witnesses.

[1] See Glossary to Stubbs's *Select Charters*, s.v. *assisa*, and the learned article on *Assize* in the Penny Cyclopædia.

But in 1285[1] it was ordained that the trial of such actions should take place in the county before the Justices of Assize. The Court then in which the action was depending, instead of bidding the sheriff bring Cornishmen to Westminster, would tell him to have the jurors at Westminster on a certain day, unless before that day (*nisi prius*) Justices of Assize should come into Cornwall. As a matter of course, the Justices of Assize came into Cornwall, and there tried the case with a Cornish jury; they tried it at *nisi prius*, and such trials at *nisi prius* before Justices of Assize there were in the year 1875.

The counties of England were long grouped into six circuits in which assizes were taken twice a year. On each occasion commissions were issued whereby the king appointed two of the Westminster judges, and the serjeants-at-law who practised on the circuit, his justices to take the assizes of the counties in that circuit. As a matter of fact, one of the two judges would transact the business to be done under the commission of assize, while the other would sit under other commissions to be mentioned below. The one would sit "on the civil side," the other "on the criminal side," the one in black, the other in scarlet. The trial, therefore, generally took place before a judge of one of the three Common Law Courts. Ancient statutes had ordained that one of the justices trying the case should be a judge of one of these courts or a serjeant-at-law. Ancient statutes, it is true, had also aimed at keeping the doings of these professionals under the eyes of knights of the shire. The Charter of 1215 conceded that there should be four

[1] Stat. 13, Edw. 1, cap. 30.

such knights associated with the justices.[1] But, in course of time, as the jealousy of the king's judicial power decreased, a practice grew up of associating with the judges and serjeants, not knights of the shire but mere officers of the court, the clerk of assize and his subordinates. This association became matter of form, but of form punctually observed. The real judicial work fell to the Westminster judges; but it should be understood that such a judge, let us say of the Common Pleas, when sitting at Exeter to try an action depending in one of the Westminster courts, was sitting there, not as a judge of the Common Pleas, but as a royal commissioner sent out for this one occasion to take the assizes of Devonshire, and he could try a King's Bench case just as readily as a Common Pleas case. If there were a press of work he would ask a serjeant to try some cases, and this the serjeant could do; for he, just as much as the judge, was a Justice of Assize named in the commission. In 1850, serjeants-at-law becoming scarce, queen's counsel were put on the same level with them for this purpose, and the names of the queen's counsel on the circuit were usually put in the commission of assize, so that one of them was competent to sit as a Justice of Assize, and therefore to try a case at *nisi prius*.

But the powers, or at least the main powers, of the judges on circuit in respect of crimes were derived from other commissions, that of *gaol delivery* and that of *oyer and terminer*. The former, according to modern practice, was directed to the two Westminster judges, the serjeants, queen's counsel, and circuit officers, and constituted

[1] See charter of 1215, art. 18; charter of 1217, art. 13; stat. 13 Ed. I., c. 30; 27 Ed. I., c. 4; 12 Ed. II., c. 3; 14 Ed. III., c. 16.

them, or any two[1] of them (of whom one was to be a judge, serjeant, or queen's counsel), the Queen's justices to deliver the county gaol. The latter was directed to the same persons, and to some great noblemen and landowners of the district, and appointed them, or any two or more of them, the Queen's justices to inquire of, hear, and determine (*oyer et terminer*) all felonies or other crimes in the counties of the circuit; but in this case, again, one of the acting justices was to be one of the two Westminster judges, a serjeant, or a queen's counsel. Very possibly the inclusion in this commission of some freeholders of the shire is a trace of the once popular demand that a free man shall have the judgment of his peers.[2] In fact, however, for some time back, trial under either of these commissions has been trial before a single justice, usually before one of the two Westminster judges, though occasionally a serjeant or a queen's counsel tried some cases at the judge's request.

The courts periodically and temporarily created by these commissions were entirely distinct from the courts at Westminster; but one of these Westminster courts, the Queen's Bench, had a high criminal jurisdiction all its own. In whatever county it was holden, it was for that county a Court of Oyer and Terminer, could receive indictments for that county, and do justice upon the

[1] A reader curious of legal fictions should consult *Leverson* v. *The Queen*, *Law Reports*, 4 *Queen's Bench*, 394. Despite the words of the commission, it is "the inveterate practice" that a single judge tries the case.

[2] Gneist, *Verfassungsgeschichte*, § 19 [ed. 1882, p. 295, note]. According to modern interpreters there is not much practical difference between these two commissions, *i.e.*, they authorise nearly the same things.

indicted. Theoretically it was not bound down to Westminster as was the Court of Common Pleas, but in fact Westminster was its settled home, and before it therefore could be tried those indicted by a grand jury of Middlesex. But then, again, it had a control over all other criminal courts. It could, by writ of *certiorari*,[1] order, *e.g.*, the Quarter Sessions for Kent to transmit to it an indictment received at those sessions, and, this done, the accused would stand his trial at the bar of the Queen's Bench, a Kentish jury being summoned for that purpose to Westminster, or (as would be the case unless the matter was of grave public importance) the Queen's Bench would order the Kentish sheriff to send a jury to Westminster on a certain day *nisi prius* Justices of Assize should visit Kent. In this last case, the accused would be tried in Kent by a justice sitting under the commission of assize, and empowered therefore to try at *nisi prius*, cases depending in the Westminster courts.

"The Assizes," then, came to mean sittings held under these commissions. Usually the same two judges had all three commissions, and commissions were issued every spring and summer. In the present century it became the practice to send commissioners to deliver the gaols in the winter also, a practice which was gradually extended from the home counties to the rest of England, (for the Queen could issue commissions of oyer and terminer and gaol delivery when it pleased her) and the phrase, "the Assizes," was somewhat loosely used to signify a sitting of these royal commissioners, whether they had or had not the commission of assize.

We have spoken of these things in the past tense, but so far as criminal business is concerned we might, with

[1] See above, p. 104.

but a few nominal changes, have spoken in the present. In 1875, when the old courts were abolished, the criminal jurisdiction of the Queen's Bench was transferred to the new High Court, and was assigned to its Queen's Bench Division, which division (taking, for this purpose, the form of a "divisional court,"[1] a tribunal constituted by two or more judges) can now do exactly, or almost exactly, what we have described the Queen's Bench as doing. Then, further, there was "transferred to and vested in" the new High Court the jurisdiction of the courts created by commissions of assize, oyer and terminer, and gaol delivery, and it was declared that such jurisdiction should for the future not be exercised except by the High Court. But it was also declared that the Queen might, by commission of assize, or any other commission, assign to any judges of the High Court, or other persons usually named in commissions of assize, the duty of determining, within any district fixed by the commission, any causes depending in the High Court, or the exercise of any civil or criminal jurisdiction capable of being exercised by the High Court; and any commissioner engaged in the exercise of such jurisdiction was to be "deemed to constitute a court of the said High Court of Justice."

As a matter of fact, the old commissions are still issued in almost their old form. At present, commissioners are sent out four times a year, in summer and winter to take both civil and criminal business, in spring and autumn to take only criminal business, except in a few populous districts, where civil business also is taken. But the court which such a commissioner now holds is the High Court of Justice, or, if our statute-makers will

[1] See above, p. 55.

have it so, "a court of the said High Court of Justice."[1] This as regards civil cases marks a considerable change. The old commissioner of assize, sitting at *nisi prius*, was not the Queen's Bench, or any other of the Westminster courts, and, roughly speaking, his business was merely to conduct the trial by jury of questions of fact in an action depending in one of the courts at Westminster. The commissioner now holds the court in which the action is depending, viz., the High Court, and he, sitting at the assize town, can dispose completely of the whole action, decide all questions of law, and pronounce the judgment of the High Court. As regards criminal cases, the change has been slighter, for the commissioner of oyer and terminer, or of gaol delivery, could always dispose finally of indictments; the court he held could give judgment and sentence, and bid the sheriff do execution, and even the commissioner of assize sitting at *nisi prius* to try indictments pending in the Queen's Bench had, by statute, similar powers. The changes here, then, have been small, and of a very technical kind; they are in words and names rather than in our law; and, indeed, despite statutory directions, we are hardly yet accustomed to "deem" that the criminal courts held under the old commissions are courts of the High Court of Justice.[2]

[1] A rationalistic reader may urge that if a court is a court of a court, the court of which it is a court is either itself or some other court, and that either alternative is absurd. A reference to the omnipotence of parliament is, perhaps, the only answer possible; but certain technical difficulties were thus inelegantly surmounted.

[2] One of these technical changes was brought to light by the recent case of the *Mignonette* (*Times*, 1884, Nov. 26, Dec. 3, 5, 10). It seems to me that there may be others of which it has not yet been necessary to take any account.

Now as to the Central Criminal Court. Above we have spoken of the unfortunate situation of modern London, built as it is at a confluence of counties.[1] In 1834, the city, the whole of Middlesex, and the suburban parts of Essex, Kent, and Surrey were constituted a single territory, a single "venue," for the purpose of indictments and criminal trials. The king was empowered by statute to issue commissions of oyer and terminer and gaol delivery for this district, and such commissions were to be standing commissions, they were to hold good until new commissions should be issued. Such commissions might include, by generic description, the judges of the common law courts, the three judicial officers of the city,[2] the lord mayor and aldermen, certain other officers, *e.g.*, the Chancellor, and any other persons whom the king might name, and these were to be judges of a new court called the Central Criminal Court. Sittings under these commissions were to be held at least twelve times a year. Commissions were issued; it is needless to state their antique terms. A trial at the Central Criminal Court ("Justice Hall in the Old Bailey," a place long ago consecrated to criminal trials, became its home) in fact meant trial before one of the three civic judges, or, if the case were grave, before a judge of one of the three common law courts. Seemingly, this tribunal also must now "be deemed to constitute a court of the said High Court of Justice," though we have not yet got into the way of calling it so.[3] Practically the change is small.

[1] See above, p. 98.

[2] See above, p. 97.

[3] This seems the result of secs. 16, 22, 29, 76, of the Judicature Act of 1873, but I am not aware that any one has yet called the old court by the new name. I regret, therefore, that I must make this statement without giving reasons.

The judge who tries the graver cases is a judge of the High Court, and no longer a judge of one of the three common law courts; other cases are tried by the recorder, the common serjeant, or sometimes the judge of the City of London Court.

To cease "deeming" and come to facts: an indicted commoner not tried at Quarter Sessions will really be tried by a single judge of the Supreme Court; or possibly if the crime be not of the worst, by some queen's counsel or one of the city judges, or possibly (but this is improbable) he will be tried at the bar of the Queen's Bench Division by two or more of its judges. The judges of the Chancery Division and those of the Appeal Court have sometimes been sent on circuit, but just at present the practice is to keep them in town, and get the circuit work done by the judges of the Queen's Bench Division.

Of the assize geography it would be vain to say much. After having been unaltered for ages it has lately been subjected to many experiments. To start with the county, whether a "county at large" or "a county corporate,"[1] is the local unit, it is a "venue," but for some time back the importance of the counties corporate has been declining, since a crime committed in one of them can be tried in the adjacent or circumjacent county at large. Then each county had its assize town or towns; in Somerset, for example, the spring assizes were held at Taunton, the summer at Wells and Bridgewater alternately. Then in this century Yorkshire was divided into two venues, Lancashire into three, and Leeds, Liverpool, and Manchester became assize towns; a similar honour has just been conferred on Birmingham, and Warwickshire has been divided into two venues. Of the circuits there have been many

[1] See above, p. 71.

modifications, and last year a practice was begun of putting all the judges in all the commissions, so that any one of them can go to the help of an over-worked brother. This circuit system is flexible, for it is governed as of old by the royal will, which nowadays means that large changes can be made in it without any legislation if the Chancellor and the judges think fit. The old law which gives to a crime a local character is a different matter, and very possibly it will soon be swept away. At least within the central criminal district trial quickly follows committal, for justice is done at the Old Bailey once a month, and for the rest of England there are quarterly gaol deliveries and quarter sessions.

CHAPTER XIV.

A CRIMINAL TRIAL.

A PERSON indicted has more than one opportunity of objecting to the indictment as not adequately charging him with any crime known to the law. He can do this at the outset when he is arraigned—that is, called upon to plead—or again after the verdict, though of some defects he must take advantage before the verdict or not at all, for they will be "cured" by a verdict against him. On the whole, though, the accused is no longer likely to escape by reason of a merely formal slip, as he did in the good old days when barbarous law was tempered by luck, an indictment must still be a very definite statement of a specific crime or specific crimes, for which and for no other crimes the accused can be tried. One may sometimes be indicted of a greater crime and found guilty of a lesser that would be included in that greater—one may be indicted for murder and found guilty of manslaughter; but one cannot be indicted for murder and found guilty of theft. The rules about this matter and about charging a man with several crimes in one indictment are complicated by the distinction between felony and misdemeanour, but we may fairly say that the accused will have to meet some definite charge or

charges expressed in language which, though needlessly verbose, will be precise.[1] Beyond the indictment there is no written pleading. The accused, unless he can plead a royal pardon, or that he has been already acquitted or convicted of the same charge, pleads by word of mouth "guilty," or "not guilty;" if the former, then he is sentenced, if the latter, his guilt must be proved against him.

"The jury being sworn, the trial proceeds. It consists of the following steps. The prisoner is given in charge to the jury by the officer of the court. The counsel for the Crown states his case and calls his witnesses to prove it. If the prisoner calls no witnesses, or calls witnesses to character only, the counsel for the Crown may (unless the prisoner is undefended by counsel) at the end of his evidence sum up its effect to the jury. The prisoner, or his counsel, then makes his defence, and calls his witnesses. If he calls witnesses the counsel for the Crown has a right to reply, and if the Attorney-General or Solicitor-General prosecutes in person, he has a right to reply whether the prisoner calls witnesses or not. The judge then sums up the evidence. The jury return their verdict. If they acquit the prisoner, he is discharged. If they convict him, he is asked in cases of felony what he has to say why judgment should not be passed upon him, and unless he says something in arrest of judgment, he is sentenced."[2]

The outlines of a trial by jury are familiar to English

[1] At present, criminal procedure is much more antique than civil procedure; but a Code of Criminal Procedure, as well as a Code of substantive Criminal Law, has for some time past been awaiting the leisure of Parliament.

[2] Stephen, *Hist.*, Vol. I., p. 303.

citizens; the history and the praises of this institution can be found elsewhere; we can here notice only a few salient points. The duty of serving upon juries is laid upon men between the ages of twenty-one and sixty who have a certain property qualification, high when compared with that which now gives the county franchise. To put the matter shortly, one who is a householder rated at £20 (or in Middlesex, £30), or has an interest in land worth £10 or £20 (according to the nature of the interest) is bound to serve. But for jurors, both grand and petty, at the borough sessions the qualification is lower; they need but be burgesses of the borough, and this implies no more than rate-paying residence.[1] It is said to be doubtful whether the grand jurors at the assizes need be qualified by property, but they are usually county justices. Then there are disqualifications and exemptions. Persons attainted of treason or felony, or convicted of infamous crime, are disqualified unless they have been pardoned, and peers, members of Parliament, the clergy of all confessions, practising lawyers and doctors, and many other persons have been exempted for reasons that are not very obvious. Then there is a difference between common juries and special juries. A practice grew up and at length obtained legislative sanction, of taking from out the general jury list persons described as esquires to serve as jurors for difficult cases, and of paying them a guinea instead of the eightpence given to common jurors. As matters now stand, a person is bound to serve on special as well as common juries if he is entitled to be called esquire, if he is a banker or merchant, or if he occupies a house rented at £50, or in large towns £100. In a civil action

[1] Chalmers, *Local Government*, p. 74.

which is to be tried by jury, a special jury can be had at the instance of either party, and there is a mode whereby under order of the High Court a misdemeanour (but not a felony) can be tried by a special jury. In 1870 a statute decreed that common jurors should be paid ten shillings a day, but no machinery was provided for carrying this into effect, and the act was at once repealed. A juror in a county court is paid one shilling for every case.

"To get twelve men into a box" is not a simple process. Briefly, it is this: the overseers of the parishes yearly make out lists of the persons bound to serve; these lists are settled for each sessional division by two justices, who can remove and add names, and before whom all claims for exemption should be made. From these lists the sheriff (*i.e.*, undersheriff) makes the jurors' book for the year, distinguishing those who can be summoned for special juries. Then when there is to be a sitting of a court which will need jurors, the sheriff is bidden to summon a competent number. The choice of those to be summoned rests with him, or rather with the undersheriff, but a man who has served becomes exempt for a certain time unless the whole list has been exhausted. Those who when summoned do not attend, can be fined. The selection of jurors has been left in the undersheriff's hands after the discussion of schemes for making the process more mechanical.

There is some elaborate law about the right to challenge jurors, that is, to object to their being sworn. It has come to us from an age when a man was likely to know the neighbours who came to try him, and little has been heard of it for a long time past. Either party to an action or prosecution can challenge the whole

array of jurors on the ground of the sheriff's partiality, and can challenge an individual juror as not qualified or not impartial. This is challenging for *cause*, and the truth of the allegation is thereupon tried; but besides this, the accused can challenge *peremptorily*—that is, without assigning any cause—thirty-five persons in case of treason, and twenty in case of felony. There can be no peremptory challenge in a civil action or on a trial for misdemeanour. In Ireland the right to challenge is freely used, and of course it may be very valuable. If the prosecutor or the accused fears that a fair trial of a criminal case cannot be had owing to local prejudices or the like, he can apply to the High Court, which can remove the indictment by writ of *certiorari*, and order that the case be tried at its bar or at the Old Bailey.

One of the public duties which our law enforces is the duty of giving evidence. A person can be required to testify in criminal prosecutions and civil actions, and also in many proceedings of many kinds which are inquisitorial rather than judicial. For instance, one may be summoned as a witness, not only before the ordinary law courts, before ecclesiastical courts, before courts-martial, before magistrates and coroners, but also before either House or a committee of either House of Parliament; or, again, to take examples of what is becoming common, before the persons appointed by the Board of Trade to investigate the causes of a railway accident, or by the Home Office, to investigate the causes of an explosion. If one thus summoned will not attend, he can generally be punished in a very summary way. In civil actions a witness need not appear unless a reasonable sum is tendered to him for his

expenses, but no such tender is necessary in a criminal case.

Very great changes have of late been made in the law touching the competence of witnesses. A person convicted of any one of many crimes was incapable of giving evidence. This has been altered. The testimony of a criminal is now taken for what it is worth, and occasionally it may be worth much. Then, again, all persons interested in an action, including, of course, the parties, were incompetent to testify. After a strenuous opposition this rule, which some regarded as of the highest value, was abolished bit by bit. The usual defence of it was that it prevented perjury. The evidence of the parties is now so important a part of the evidence in an action, that it is hard to remember that a few years ago it could not be received. But still, in criminal cases, the accused can give no evidence. This rule is defended on another ground, namely, that if he be allowed to testify he must be liable to be interrogated, and to questioning a prisoner modern English opinion has had a strong dislike. But this dislike seems to be vanishing. It is forcibly urged that innocent but ignorant persons, when not defended by counsel, lose much by not being questioned. At present, however, we must note this rule as one of the chief peculiarities of our criminal procedure. Generally, also, in a criminal case a wife cannot testify for or against her husband, nor a husband for or against his wife.

An important part in the conduct of a trial is played by what are known as rules of evidence. Trial by jury has given birth to a system of definite canons, the object of which is not merely to prevent a waste of time over evidence of a kind that is presumably worth very little,

but also to confine the attention of jurors to such evidence as is presumably worth much.[1] A good deal, it may be, is excluded as "not evidence" which would, in the particular case, affect a reasonable man's opinion, but unyielding, general rules seem necessary if there is to be trial by jury. More harm than good might be done by an attempt to condense these rules into a few paragraphs of such a book as this; but the rule against "hearsay," the main upshot of which is very generally known, may serve as an example. A prudent man will often act upon hearsay, but, on the whole, it has been thought that evidence of this kind is not trustworthy enough to be put before a court. In criminal cases these rules of evidence are certainly not too unfavourable to the accused. Evidence of his good character will be heard, but not evidence of his bad character, unless evidence of good character has already been given. It is treated as quite irrelevant that one charged with a crime has undoubtedly committed many other crimes. The confession, too, of the prisoner will not be admitted if procured by the threat or promise of the constable or of the magistrate. That witnesses are open to cross-examination, that cross-examination has become one of the fine arts, that in a criminal trial the burden of proof is on the Crown, need hardly be said. Law presumes that the prisoner is innocent until he is found guilty, but it were well to wager four to one that the jury will be satisfied of his guilt.[2]

[1] The same rules prevail when there is trial without jury; but I doubt whether, but for trial by jury, they would have taken their very definite shape.

[2] In 1883 there were 11,347 persons found guilty against 2,723 found not guilty.

The twelve jurors must agree before there can be a verdict. This has long been the English rule, and, at least as to criminal cases, English opinion seems to be strongly in its favour. Occasionally in civil cases the parties will agree to abide by the verdict of a majority. If there is no reasonable prospect of agreement, the judge will dismiss the jurors, and the trial having proved abortive, the case, whether civil or criminal, can be tried again.

Questions of law are for the judge, questions of fact for the jury. This is the well-known rule, and it is known also that, at least in criminal cases, jurors have it in their power to effectually break the rule; they can find a general verdict of "guilty" or of "not guilty." They can thus disregard what the judge has told them about the law, and give effect to any opinions or wishes of their own; nor can they be called to account for a perverse verdict; corruption, of course, would be another matter. In some countries, which have manufactured trial by jury in accordance with a theory, jurors are only trusted to find the minor premise of the judicial syllogism; here they are trusted to find the conclusion. Those who best can speak say that this trust is not misplaced; English jurors will take the law from the judge even when they do not like the law. That as many Englishmen as possible shall be ready to do this is, perhaps, the best result that trial by jury can have for us. If they please, jurors in criminal as well as civil cases can find a special verdict, can find, that is, just the facts and pray the court to draw the due conclusion. This was lately done in a trial for murder, but it is now extremely rare, because, if there is doubt about the law, the judge reserves the question for a court for Crown

Cases Reserved, of which hereafter. In civil cases it is now common to submit to the jury only specific questions of fact. In civil cases, too, new trials can be, and often are, granted, because the judge has misdirected the jury in matter of law, or has wrongly admitted or rejected evidence, or because the verdict is "against the weight of evidence," which phrase seemingly means that the court granting the new trial is not only convinced, but fully convinced that the verdict is wrong. Applications for new trials have to be speedily made, but the delay and expense caused by such applications, and by trials made futile because jurors do not agree, are heavily weighting the trial by jury of civil cases in its present competition with trial by judge.

In criminal cases there is, properly speaking, no appeal. But (1) the High Court will sometimes[1] (for the reasons for which it grants new trials in civil cases) grant a new trial after a conviction for misdemeanour; it does not grant a new trial in case of felony, nor after an acquittal for misdemeanour. (2) There is a procedure by writ of error whereby, with the Attorney-General's leave, cases can be taken from an inferior court to the High Court, and thence to the Court of Appeal and so to the House of Lords; if the error be in the High Court, then the case will go to the Court of Appeal and so to the House of Lords. But this can only be done when there is error "apparent on the record," and this phrase has a narrow and highly technical meaning. The "record," which, in fact, is not drawn up unless there is to be a writ of error, will contain what may

[1] This I believe has only been done after a trial at *nisi prius*.

be called a formal history of the trial.[1] It is difficult to describe in general terms the errors which would appear there, but (and this is the important fact) no mistake the judge may make in directing the jury or in admitting or excluding evidence, will show itself on the record; the verdict again may be most perverse, and yet the record will be flawless. The sentence, on the other hand, will appear, so were the judge to pass a sentence not authorised by law there would be error on the record. But writs of error are so extremely rare that we must say no more. (3) On a conviction (but not an acquittal) the judge, chairman, or recorder, at the trial can, if he thinks fit, reserve a question of law (but not of fact) for a court for Crown Cases Reserved which will be constituted by five or more judges of the High Court, who can finally decide the question, reverse, amend, or affirm the judgment. Only ten cases were thus heard in 1882, only twelve in 1883; the criminal law is, for the more part, very well settled, or at least the judges who administer it, seldom have any doubt about its provisions.

Lastly, the Queen can pardon a criminal either absolutely or upon condition, and this power wielded by the Home Secretary is sometimes used as a means (a clumsier means could hardly be imagined) of practically nullifying an unsatisfactory verdict. More frequently it is used for the purpose of mitigating the punishment of one found guilty of murder, which now is almost the only crime

[1] The record of the criminal trial of the Tichborne claimant fills about two hundred pages of print, states at great length how the court adjourned from day to day, but says nothing about any evidence or any summing-up. (*Cases on Appeal to the House of Lords*, Vol. 343). It is a fine collection of mediæval curiosities.

for which our law has but a single doom, to wit, death. In general, the law does but fix some maximum punishment, the judge can give less, and the prerogative of mercy is but very seldom used to mitigate the sentence that he passes. The subject of appeal in criminal cases has lately been before parliament, and changes are to be expected, but we must here take leave of the English citizen on the confines of "The Penal System."

THE END.

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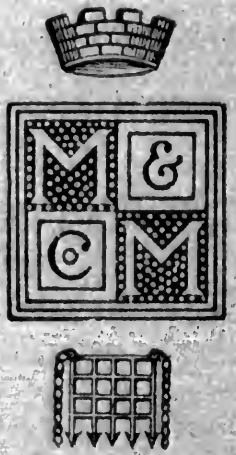
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